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Recent Cases

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CHARITABLE TRUSTS— VALIDITY OF DEVISES TO UNSPECIFIED CHARITIES

Yeager v. Johns[1]

Sadie Donahoe died testate August 17, 1968, leaving a residuary estate in excess of $50,000. Article X of her will devised the residue "to the Reverend H.J. Lambert, to be used by him at his discretion for religious and educational purposes."[2] On challenge by the heirs of the testatrix, the circuit court held that article X of the will was invalid because the beneficiaries of the purported charitable trust were so uncertain and unascertainable that the intentions of testatrix could not be followed with certainty.[3] Appealing to the supreme court, proponents of the will alleged that article X created a valid charitable trust by authorizing a trustee who was ready, willing and able to act to select at his discretion religious and educational purposes.[4] In addition, the proponents argued that vesting this discretion in the trustee was not impractical because a court of equity can compel the trustee to exercise his power to appoint religious and educational organizations as beneficiaries and can prevent a diversion from the purposes stated in the will.[5] The supreme court upheld the devise.[6]

From 1860, when Missouri adopted the English law of charitable trusts by judicial decision,[7] until 1917, the Missouri Supreme Court consistently upheld the validity of devises in trust to be used in the trustee's discretion for unspecified charitable purposes.[8] Indefiniteness or uncertainty as to the beneficiaries was not considered a serious defect because the trustee could make the charitable purposes certain.[9] In 1917, however, the supreme court

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1. 484 S.W.2d 211 (Mo. 1972).
2. *Id.* at 212.
3. *Id.*
4. *Id.* at 213.
5. *Id.*
6. *Id.* at 215.
7. Chambers v. City of St. Louis, 29 Mo. 543 (1860).
8. For an historical discussion of the validity of powers of appointment to unspecified charities in Missouri see Fratcher, *Powers of Appointment to Unspecified Charities,* 32 Mo. L. REV. 443, 451-58 (1967).
9. The following devises in trust were held valid: Sandusky v. Sandusky, 261 Mo. 351, 168 S.W. 1150 (1914) ("for the general advancement of Christianity"); Sappington v. Sappington School Fund Trustees, 123 Mo. 32, 27 S.W. 356 (1894) (to "apply the interest of said fund to such other objects of charity in said county as in their judgment may be most needy"); Powell v. Hatch, 100 Mo. 592, 14 S.W. 49 (1890) ("such charitable purposes as my said trustee may deem best"); Howe v. Wilson, 91 Mo. 45, 3 S.W. 390 (1886) (to divide the trust funds "among such charitable institutions of the city of St. Louis, Missouri, as he shall deem worthy"); Chambers v. City of St. Louis, 29 Mo. 543 (1860) ("to furnish relief to all poor emigrants and travelers coming to St. Louis on their way,

in *Jones v. Patterson*[10] held invalid a devise to an executor "to be used for missionary purposes in whatever field he thinks best to use it, so it is done in the name of my dear Savior and for the salvation of souls," because the will failed to provide the particular form of Christianity to be advanced, the class of persons to be benefitted, or the form of benfit they were to receive.[11] In addition, dictum in a 1928 Missouri case stated that a bequest "to such charitable uses and purposes as [the executor] may determine" was void.[12]

As authority for its holding in *Jones v. Patterson*, the court relied on *Morice v. The Bishop of Durham*,[13] which held that *private* trusts would fail if the beneficiaries were not definitely ascertainable from the terms of the instrument creating the trust. In addition to misapplying the *Morice* rule, the court failed to consider an English case decided just prior to *Morice* which held that a power of appointment to unspecified charities was valid.[14] Nor did the court follow dicta in *Morice* which stated that if any of the trust property had been devoted to charity the trust would be valid to that extent.[15]

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bona fide, to settle in the west"); *See* Fratcher, *supra* note 8, at 451-54.

But see Hadley v. Forsee, 203 Mo. 418, 101 S.W. 59 (1907); Corby v. Corby, 85 Mo. 371 (1884); Schmucker's Estate v. Reel, 61 Mo. 592 (1876); each of which may be distinguished. In *Schmucker's Estate* the executor was devised "two hundred dollars, to be applied to a specific purpose which I [testator] explained to him" and "five hundred dollars for another and specific charitable purpose which he well understands" and the residue "to apply to charity, according to his best discretion." The trust failed because the instructions were unwritten. The court said the trust could not be upheld where decedent made no memorandum in accordance with the oral instructions. In *Corby* the residuary clause of testator's will provided "that the balance of my said property will be given to advance the cause of religion and promote the cause of charity, in such manner as my dearly beloved wife may think will be most conducive to the carrying out my wishes." The trust failed because it could not be definitely ascertained what testator's wishes were. In *Hadley* the Attorney General sued to establish a charitable trust in accordance with the residuary clause in the will under attack in *Corby*. The court dismissed the suit on the ground that the testator intended particular charities named to his wife outside the will which, because of her death, could no longer be ascertained. The court also said there was no way to know whether the wife was carrying out testator's directives since it was impossible to tell what religion or charity the testator intended. Hence the gift was impossible of execution.

10. 271 Mo. 1, 195 S.W. 1004; *see* Annot., 1917F L.R.A. 660.

11. 271 Mo. at 3, 195 S.W. at 1005.

12. Wentura v. Kinnerk, 319 Mo. 1068, 5 S.W.2d 66 (1928). *But see* Kinnerk v. Smith, 328 Mo. 513, 524, 41 S.W.2d 381, 386 (1931), wherein the supreme court recognized this language in *Wentura* as dictum; Gossett v. Swinney, 53 F.2d 772, 782-83 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932), *aff'g* Irwin v. Swinney, 44 F.2d 172 (W.D. Mo. 1930), wherein the court states the language in *Wentura* "was based apparently upon a misapprehension of the rule announced in . . . Morice v. The Bishop of Durham . . . ."

13. 10 Ves. Jun. 521, 32 Eng. Rep. 947 (1805), affirming the decree of Sir William Grant, Master of the Rolls, 9 Ves. Jun. 399, 32 Eng. Rep. 656 (1804).

14. Moggridge v. Thackwell, 7 Ves. Jun. 36, 32 Eng. Rep. 15 (1803).

15. 10 Ves. Jun. 522, 32 Eng. Rep. 947, 954 (1805), affirming the decree of Sir William Grant, Master of the Rolls, 9 Ves. Jun. 399, 32 Eng. Rep. 656 (1804).

The court also relied on early New York and Virginia decisions[16] that had invalidated charitable trusts because of indefiniteness of beneficiaries, even though those cases were inconsistent with Missouri cases[17] of that period. In New York charitable trusts were treated the same as private trusts,[18] and in Virginia it had been held that the same degree of certainty of beneficiaries was required for charitable trust as for private trusts.[19]

Jones v. Patterson has caused continuing confusion in the law of charitable trusts in Missouri. Later cases have upheld the creation of powers of appointment to unspecified charities[20] and devises in trust for broad, though not unspecified, charitable purposes,[21] but *Jones* has not been overruled and continues to offer a viable ground for attack to those who would defeat the charitable gift.[22]

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16. Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891); Fifield v. Van Wyck, 94 Va. 557, 27 S.E. 446 (1897).

17. Cases cited note 9 *supra.*

18. Jackson v. Phillips, 96 Mass. (14 Allen) 539, 589 (1867), *referring to* Bascom v. Albertson, 34 N.Y. 584 (1866). The English law of charitable trusts had been wholly abrogated by statute.

19. Philadelphia Baptist Ass'n v. Hart, 17 U.S. (4 Wheat) 1 (1819) (applying Virginia law); annot., 163 A.L.R. 784 (1946).

20. Altman v. McCutchen, 210 S.W.2d 63 (Mo. 1948) (testator's will gave the executor "unlimited discretion" to dispose of the proceeds of testator's property "to the charitable and other institutions devoted to the alleviation of human suffering and want."

21. Gossett v. Swinney, 53 F.2d 772 (8th Cir. 1931), *cert. denied,* 286 U.S. 545 (1932), *aff'g* Irwin v. Swinney, 44 F.2d 172 (W.D. Mo. 1930) (devise gave trustees the residue for "such charitable, benevolent, hospital, infirmary, public, educational, scientific, literary, library or research purpose in Kansas City, Missouri, as said Trustees shall in their absolute discretion determine to be in the public interest."); Epperly v. Mercantile Trust, 415 S.W.2d 819 (Mo. 1967) ("I leave to the discretion of my Trustees the distribution of the income to Protestant churches and religious organizations but direct that the gifts be used to save souls and not to build buildings or to improve existing buildings."); Standley v. Allen, 349 Mo. 1115, 163 S.W.2d 1012 (1942) (Two devises: one to a trustee "for the purpose of having him dispose of the same to some worthy charitable organization, in Missouri, to be selected by him; provided, if at said time there shall be in Southwestern Missouri, a home for aged people, I charge my trustee with the duty of transferring the said trust estate to said Institution"; the other to a trustee "with the duty of disposing of said balance of my estate to some worthy charitable organization in Missouri, and the preference to be given to aged people."); St. Louis Union Trust Co. v. Little, 320 Mo. 1058, 10 S.W.2d 47 (1928) (devise to an individual "to be spent on the welfare of poor, homeless children.")

22. Thus, the will opponent in *Yeager,* relying on *Jones* and other cases, attempted to distinguish the devise in Epperly v. Mercantile Trust, 415 S.W.2d 819 (Mo. 1967) (discussed note 21 *supra*), to "Protestant churches" as establishing a sufficiently specific class of beneficiaries, whereas a devise to "religious and educational purposes" did not. *Epperly* itself made this argument possible by distinguishing *Jones* in vague and overly narrow terms. "Where, as here, a trust provision gives to the trustee discretion in applying the trust property to the specified charitable purpose, the rules in Jones v. Patterson . . . should not be followed." *Id.* at 822.

A charitable trust may be created in a will or deed by any expression of the testator's intention; technical words are not required.[23] Furthermore, equity favors charitable trusts because of the benefits they yield to society and liberally construes them to give them effect whenever possible.[24] Valid charitable objects include the relief of poverty and the advancement of education, religion, science, the arts, health, governmental projects, or any other purposes that benefits the community.[25] In general, a trustee appointed to select charitable objects need not be restricted to a definite group or class[26] nor must the beneficiaries be definitely ascertainable,[27] since the testator has provided the means of making certain that which is uncertain.[28]

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23. A charitable intent need only be ascertained from the terms of the instrument. G. BOGERT, LAW OF TRUST § 66 (1963); SCOTT, TRUSTS § 351 (2d ed. 1956); 15 AM. JUR. 2D *Charities* § 18 (1964); 14 C.J.S. *Charities* § 5 (1939).

24. First Nat'l Bank v. Jacques, 470 S.W.2d 557, 561 (Mo. 1971); First Nat'l Bank v. Stevenson, 293 S.W.2d 362, 367 (Mo. 1956); Taylor v. Baldwin, 362 Mo. 1224, 1240, 247 S.W.2d 741, 749 (En Banc 1952); Burrier v. Jones, 338 Mo. 679, 685, 92 S.W.2d 887 (En Banc 1936); 15 AM. JUR. 2D *Charities* § 105 (1964); 14 C.J.S. *Charities* § 6 (1939); 50 CAL. L. REV. 885 (1962); 54 VA. L. REV. 436, 464 (1968).

25. Gossett v. Swinney, 53 F.2d 772, 777 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932); G. BOGERT, TRUSTS AND TRUSTEES § 368 (2d ed. 1964); RESTATEMENT (SECOND) OF TRUSTS § 368 (1959); 14 C.J.S. *Charities* § la (1939); 15 AM. JUR. 2D *Charities* § 57 (1964).

26. Russel v. Allen, 107 U.S. 163 (1882); Gossett v. Swinney, 53 F.2d 772, 782-83 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932); Epperly v. Mercantile Trust, Ill., 415 S.W.2d 819, 822 (Mo. 1967); Voelker v. St. Louis Mercantile Library Ass'n, 359 S.W.2d 689, 696 (Mo. 1962); Newton v. Newton Burial Park, 326 Mo. 901, 909, 34 S.W.2d 118, 120, 121 (1930); St. Louis Union Trust Co. v. Little, 320 Mo. 1058, 1070, 10 S.W.2d 47, 49 (1928); Chambers v. City of St. Louis, 29 Mo. 543, 589-90 (1860); RESTATEMENT (SECOND) OF TRUSTS § 364 (1959); Fratcher, *Bequests for Purposes*, 56 IOWA L. REV. 773, 774 (1971).

See also Fratcher, *supra* note 8, at 449, indicating a power to appoint to unspecified charities has been held valid by the vast majority of American decisions even though the power has not been conferred upon a trustee. The cases are collected in SCOTT, TRUSTS §§ 395-97 (2d ed. 1956).

27. Gossett v. Swinney, 53 F.2d 772, 778 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932); First Nat'l Bank v. Jacques, 470 S.W.2d 557, 560 (Mo. 1971); Ramsey v. City of Brookfield, 361 Mo. 857, 861, 237 S.W.2d 143, 145 (1951); St. Louis Union Trust Co. v. Little, 320 Mo. 1058, 1070, 10 S.W.2d 47, 49 (1928); RESTATEMENT (SECOND) OF TRUSTS § 364 (1959).

28. Gossett v. Swinney, 53 F.2d 772, 782-83 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932); Epperly v. Mercantile Trust, 415 S.W.2d 819, 822 (Mo. 1967); Altman v. McCutchen, 210 S.W.2d 63, 67 (Mo. 1948); Standley v. Allen, 349 Mo. 1115, 163 S.W.2d 1012 (1942) (*citing* RESTATEMENT (SECOND) OF TRUSTS § 396, Howe v. Wilson, 91 Mo. 45 (1886) & Powell v. Hatch, 100 Mo. 592, 14 S.W. 49 (1890)); St. Louis Union Trust Co. v. Little, 320 Mo. 1058, 1070, 10 S.W.2d 47, 49 (1928); Sappington v. Sappington School Fund Trustees, 123 Mo. 32, 42, 27 S.W. 356, 358 (1894); Howe v. Wilson, 91 Mo. 45, 52 (1886); Moggridge v. Thackwell, 7 Ves. Jun. 36b, 32 Eng. Rep. 15 (1803); G. BOGERT, TRUSTS AND TRUSTEES § 376 (2d ed. 1964); SCOTT, TRUSTS §§ 395-97 (2d ed. 1956); Fratcher, *supra* note 7 at 449; RESTATEMENT (SECOND) OF TRUSTS § 396; 15 AM JUR. 2D *Charities* § 94 (1964); Annot., 163 A.L.R. 784 (1946); Annot., 168 A.L.R. 1350 (1947).

There are three persuasive reasons for upholding unspecified charitable devises in trust against attacks of indefiniteness and uncertainty. The first is to effectuate the testator's intent to benefit charity.[29] If the devise is invalidated, the clause will lapse and the trust property will pass under the residuary clause. If the devise was in the residuary clause the trust property will descend to the heirs at law, perhaps benefitting distant relatives and unlikely objects of the testator's bounty.

Second, by upholding devises in trust to unspecified charities courts promote the public welfare. The advancement of the arts, science, religion and education rendered by the enforcement of such devises surely outweighs any problems of enforcement. Devises in trust to unspecified charities provides desireable flexibility in the selection of charitable uses.[30] A trustee may select charitable objects which he deems worthy and is able to later adapt his selections to the changing needs of his community without invoking the doctrine of cy pres.[31]

Finally, adequate protection is afforded charitable trusts by the supervisory powers of a court of equity. Although the court itself usually does not select a charitable object,[32] it may enforce the trust by compelling the trustee to make a selection.[33] Also, equity can intercede to prevent the trustee from diverting the res to noncharitable purposes[34] and replace a trustee unwilling to properly perform his duties.[35]

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29. A fundamental rule of construction in interpreting wills is that testator's intent should be given effect if possible. SCOTT, TRUSTS § 396 (2d ed. 1956); 16 U. DETROIT L. J. 199, 201 (1953). If a testator has indicated in the terms of the will a charitable intent, that will be given effect so long as the will does not fail for some other reason. Teller v. Kaufman, 293, F. Supp. 1397 (E.D. Mo. 1968), *aff'd*, 426 F.2d 128 (8th Cir. 1970); Stuesse v. Stuesse, 377 S.W.2d 389 (Mo. 1964); First Nat'l Bank v. Stevenson, 293 S.W.2d 362 (Mo. 1956); Atkinson, Wills § 146 (1953); 57 AM. JUR. *Wills* § 1133 (1948); 95 C.J.S. *Wills* § 591 (1957).

30. Gossett v. Swinney, 53 F.2d 772, 783 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932).

31. Bogert, *The Community Trust: A Service Opportunity for Lawyers*, 41 A.B.A.J. 587 (1955).

32. Gossett v. Swinney, 53 F.2d 772, 782-83 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932); Epperly v. Mercantile Trust, 415 S.W.2d 819, 822 (Mo. 1967); Altman v. McCutchen, 210 S.W.2d 63, 67 (Mo. 1948); Thatcher v. City of St. Louis, 343 Mo. 597, 602, 122 S.W.2d 915, 916-17 (1938); Howe v. Wilson, 91 Mo. 45, 52 (1886); Fratcher, *Bequests for Purposes*, 56 Iowa L. Rev. 773, 774 (1971); Restatement (Second) of Trusts § 391 (1959).

33. 484 S.W.2d at 215.

34. Gossett v. Swinney, 53 F.2d 772, 783 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932); Epperly v. Mercantile Trust, 415 S.W.2d 819, 822 (Mo. 1967); Altman v. McCutchen, 210 S.W.2d 63, 67 (Mo. 1948); Howe v. Wilson, 91 Mo. 45, 49 (1886).

35. Epperly v. Mercantile Trust, 415 S.W.2d 819, 822 (Mo. 1967); Carlock v. Ladies Cemetery Ass'n, 317 S.W.2d 432, 440 (Mo. 1958); Taylor v. Baldwin, 362 Mo. 1224, 1240-41, 247 S.W.2d 741, 750 (En Banc 1952); Newton v. Newton Burial Park, 326 Mo. 901, 910, 34 S.W.2d 118, 121 (1930); Dickey v. Volker, 321 Mo. 235, 250, 11 S.W.2d 278, 283 (En Banc 1928); G. BOGERT, TRUSTS AND TRUSTEES § 328 (2d ed. 1964); SCOTT, TRUSTS § 397 (2d ed. 1956); 14 C.J.S. *Charities* § 49 (1939).

In *Yeager v. Johns* the Missouri Supreme Court upheld the validity of Sadie Donahoe's devise in trust for "religious and educational purposes." The holding is consistent with the majority position and the recent trend of decisions in the United States.[36] The court did not eliminate, however, the confusion regarding devises in trust to unspecified charitable purposes by overruling *Jones v. Patterson* and clarifying that *Morice v. The Bishop of Durham* applies only to private trusts. But it is probable that the effect of the decision is to do both, so that now a devise in trust "for charitable purposes" or "for charity" should be valid in Missouri. This result will promote flexibility in the exercise of charitable trusts, prevent unwarranted and vexatious attacks on similar devises, effectuate the testator's intent, and promote public welfare through the advancement of the arts, science, religion and education.

ROBERT B. MINER

LANDLORD-TENANT: IMPLIED WARRANTY OF HABITABILITY IN LEASES

King v. Moorehead[1]

Plaintiff a landlord sued in magistrate court for possession and past due rent which he claimed was owing to him pursuant to a month-to-month lease of a single family dwelling in Kansas City, Missouri. Defendant admitted that she had occupied plaintiff's premises without paying rent from May 6, 1969, to August 1, 1969, but interposed, in an appeal to the circuit court[2], two defenses to the action for the past due rent. First, she claimed she was not liable under the lease because it was an illegal contract in violation of the local housing code[3] in the following respects: rodent and vermin infestation, defective and dangerous electrical wiring, a leaking roof, and unsafe ceilings. Defendant's second defense was that she was relieved of her duty to pay rent because the landlord had substantially breached an alleged implied covenant of habitability. The circuit court disallowed both defenses as being legally insufficient.

On appeal, the Kansas City District of the Missouri Court of Appeals reversed and remanded, stating that both defenses were valid.

This is an abrupt departure from prior Missouri cases[4] that have consistently held that the doctrines of caveat emptor and independent covenants in leases bar the result reached in *King*. Under the aegis of caveat emptor it has been held that a landlord does not warrant his buildings

36. Cases are collected in SCOTT, TRUSTS §§ 395-397 (2d ed. 1956); 16 U. DET. L.J. 199 (1953). *Accord,* RESTATEMENT (SECOND) OF TRUSTS §§ 395-97 (1959). *See also* Annot., 163 A.L.R. 784 (1946); Annot., 168 A.L.R. 1350 (1947).

1. 495 S.W.2d 65 (Mo. App., D.K.C. 1973).

2. Sections 512.180, .270, RSMo 1969, provide that a cause appealed from the magistrate court shall be tried anew by the circuit court, without regard to error in the magistrate trial.

3. KANSAS CITY, MO., CODE OF GEN. ORDINANCES, ch. 20 (1967).

4. *See, e.g.,* Houfburg v. Kansas City Stock Yards Co., 283 S.W.2d 539

to be habitable and that he has no duty to repair.[5] Under the doctrine of *independent covenants* even the landlord's express covenant to repair has been held to be merely incidental to the conveyance and therefore independent of the tenant's promise to pay rent.[6] Thus, if the landlord breached his covenant, the tenant still had an obligation to pay rent; his only remedy was to sue for damages.[7]

These rules were derived from old English concepts developed in an agrarian society in which land was much more important than the buildings on it.[8] At their inception, the validity of these doctrines rested on a common understanding that a tenant was in an equal bargaining position with the landlord. The doctrines contemplated that the parties dealt at arms length and that the tenant could inspect the premises before leasing. Let the buyer beware for "there [was] no law against letting a tumble-down house."[9]

The English view remained the general rule in Missouri and elsewhere.[10] As society changed from agrarian to urban, however, the purpose of the modern lease became to secure habitable dwelling.[11] Recognizing this, the judiciary began to create exceptions to these common law property rules based on the more flexible principles of contract law.

An early exception to caveat emptor in leases was the covenant of quiet enjoyment.[12] This covenant is breached when a landlord evicts his tenant without just cause. The duty to pay rent is then suspended.[13]

From this exception came the doctrine of constructive eviction.[14] This doctrine provides a remedy when a landlord's act or omission substantially interferes[15] with the tenant's quiet enjoyment without amounting to an actual eviction. Here also, the tenant's covenant to pay rent is suspended[16] for the period following abandonment of the premises.[17] In one case,[18] a

(Mo. 1955); Shaw v. Butterworth, 327 Mo. 622, 38 S.W.2d 57 (1931); Croskey v. Shawnee Realty Co., 225 S.W.2d 509 (K.C. Mo. App. 1949).

5. *See* cases cited note 4 *supra; see generally* 2 R. POWELL, THE LAW OF REAL PROPERTY § 233 (Rohan ed. 1971).

6. 6 S. WILLISTON, CONTRACTS § 890, at 634 (3d ed. 1962).

7. *See, e.g.*, Means v. Dierks, 180 F.2d 306 (10th Cir. 1950).

8. 2 R. POWELL, *supra* note 5, at § 221.

9. Robbins v. Jones, 143 Eng. Rep. 768, 776 (Ex. 1863).

10. *See* O'Neil v. Flanagan, 64 Mo. App. 87 (St. L. Ct. App. 1895); Burnes v. Fuchs, 28 Mo. App. 279 (St. L. Ct. App. 1887).

11. Kline v. Burns, 111 N.H. 87, 91, 276 A.2d 248, 251 (1971).

12. *See, e.g.*, Johnson v. Missouri-Kan.-Tex. R.R., 216 S.W.2d 499 (Mo. 1949).

13. Jackson v. Eddy, 12 Mo. 209, 212 (1848); Dolph v. Barry, 165 Mo. App. 659, 667, 148 S.W. 196, 198 (St. L. Ct. App. 1912).

14. Dolph v. Barry, 165 Mo. App. 659, 668-69, 148 S.W. 196, 198 (St. L. Ct. App. 1912); Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826).

15. 45 U. Mo. BULL. L. SER. 41 (1931).

16. Cases cited note 14 *supra.*

17. Dolph v. Barry, 165 Mo. App. 659, 671-73, 148 S.W. 196, 198-200 (St. L. Ct. App. 1912). The abandonment requirement makes this remedy inadequate for low income tenants in times of severe housing shortages because another dwelling is likely to be as uninhabitable as the last. 495 S.W.2d at 76-77.

18. Banister Real Estate Co. v. Edwards, 282 S.W. 138 (St. L. Mo. App. 1926). Severe vermin infestation may also amount to constructive eviction. *See* Ray Realty Co. v. Holtzman, 234 Mo. App. 802, 811, 119 S.W.2d 981, 984 (St. L. Ct. App. 1938); Annot., 27 A.L.R.3d 924 (1969).

Missouri court indicated that breach of an express covenant to repair was a constructive eviction and a defense to the landlord's rent action.[19]

A New York case[20] announced the doctrine of partial constructive eviction, giving the tenant a defense to nonpayment of rent when the landlord's housing code violations deprive him of complete use of the premises. This doctrine was rejected on appeal and has not been expressly recognized in Missouri. However, in *Dolph v. Barry*[21] the St. Louis Court of Appeals allowed a partial abatement of rent in a fact situation constituting a partial constructive eviction.[22]

Another inroad on caveat emptor is the implied warranty of fitness for immediate habitation of furnished dwellings leased for a short period of time.[23] This exception has been justified on the grounds that the parties intended the premises to be ready for occupation without inspection. It is usually applied to furnished vacation houses, but has been expanded by some courts to include ordinary leases of furnished residences. For example, in *Pines v. Perssion*[24] the Wisconsin Supreme Court implied a warranty of habitability in the lease of a furnished house to a group of college students,[25] saying that the covenant to pay rent was mutually dependent upon the implied covenant to provide a habitable house. Thus, the landlord's breach[26] at the commencement of the term partially relieved the students of the duty to pay rent. The students recovered their security deposit and payment for their labor expended in making improvements, but the court held them liable for reasonable rental value[27] during their actual occupancy.

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19. Banister Real Estate Co. v. Edwards, 282 S.W. 138, 140 (St. L. Mo. App. 1926). Here, also, the court required abandonment by the tenant.

20. Gombo v. Martise, 41 Misc. 2d 475, 246 N.Y.S.2d 750 (Civ. Ct.), *rev'd*, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (Sup. Ct. 1964).

21. 165 Mo. App. 659, 148 S.W. 196 (St. L. Ct. App. 1912).

22. *Id.* at 676, 148 S.W. at 201. This new theory is not to be confused with actual partial eviction where the duty to pay rent is completely suspended because of a partial ouster by the landlord. Witte v. Quinn, 38 Mo. App. 681 (K.C. Ct. App. 1890). It is also a well established principle that a landlord has a duty to maintain portions of the premises over which he retains control, such as common passageways. Reinagel v. Walnuts Residence Co., 239 Mo. App. 701, 194 S.W.2d 229 (K.C. Ct. App. 1946).

23. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

24. 14 Wis. 2d 590, 111 N.W.2d 409 (1961), *noted in* 45 MARQ. L. REV. 630 (1962).

25. In dicta, the *Pines* court said that current legislation such as housing codes and health regulations had rendered the old common law rule of no implied warranty of habitability in leases obsolete, and:

> The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent "tumbledown" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

Id. at 596, 111 N.W.2d at 412-13.

26. The house was filthy, and the plumbing, heating, and wiring systems were in violation of the local housing code. *Id.* at 596, 111 N.W.2d at 413.

27. *Id.* at 597, 111 N.W.2d at 413. The reasonable rental value of some slum housing may approximate the contract rent.

Other exceptions mitigating the rule of caveat emptor include the unfinished premises exception,[28] latent defects and fraudulent nondisclosure,[29] the doctrine of conditions precedent,[30] the implied warranty of habitability in the sale of new houses,[31] and implied warranties in the sale of goods.[32]

Some states have changed the common law rule of caveat emptor by statutes[33] that impose duties and liabilities on landlords who fail to comply with housing standards.

In *King v. Moorehead*[34] the Kansas City District of the Missouri Court of Appeals undertook a re-examination of the common law doctrines affecting leases in Missouri, and rejected the traditional application of the doctrines of caveat emptor and independent covenants in leases. The decision is certainly in line with the modern trend, as exemplified by the various judicial exceptions discussed above, recent cases in other jurisdictions,[35]

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28. There is an implied covenant that unfinished premises will be suitable for the purpose leased. *See* 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

29. A tenant may recover for personal injury caused by a latent defect known by the landlord to exist at the beginning of the lease, 52 C.J.S. *Landlord and Tenant* § 417(3)(c) (1968). Failure to disclose may amount to fraud and give the tenant the right of recission or an action for damages. Rapacz, *Theories of Defense When Tenants Abandon the Premises Because of the Condition Thereof*, 4 DEPAUL L. REV. 173, 184-87 (1955).

30. A clause may be included in a lease expressly making the landlord's duty to repair a condition precedent to the tenant's obligation to pay rent. This is not a likely occurrence in low income housing, and the tenant's possession may constitute a waiver. Rapacz, *supra* note 29.

31. 495 S.W.2d at 75. The *King* court speculated that the Missouri Supreme Court would agree with its conclusions from an analogous holding in Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. En Banc 1972) (implying a warranty of fitness into contracts for the sale of a new home by a vendor-builder). But, cases finding an implied warranty in the sale of a house have consistently refused to extend this doctrine to the sale of used houses. *See generally*, Luckenbill, *Products Liability—Implied Warranty in the Sale of a New House*, 38 Mo. L. REV. 315 (1973).

32. UNIFORM COMMERCIAL CODE §§ 2-711, 712, 714; W. PROSSER, TORTS § 97 (4th ed. 1971).

33. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 28, § 3.45 at 267; R. POWELL, *supra* note 5, at § 233. *See, e.g.*, ILL. REV. STAT. ch. 38, § 12-5.1 (1969); MAINE ACTS ch. 270 (1971); MASS. ANN. LAWS ch. 239, § 8-h (Supp. 1968); N.Y. MULT. DWELL. LAW § 304(1) (C.L.S. Supp. 1968). Some municipalities have enacted similar statutes. *See also* Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegal Law*, 15 BUFF. L. REV. 519 (1966), Comment, *Landlord-Tenant Legislation: Revising an Old Common Law Relationship*, 2 PACIFIC L.J. 259 (1971); Comment, *Model Residential Landlord-Tenant Code—Proposed Procedural Reforms*, 25 U. MIAMI L. REV. 317 (1971).

34. 495 S.W.2d 65 (Mo. App., D.K.C. 1973).

35. *See, e.g.*, Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969). The Hawaii Supreme Court refused to apply the vacation house exception and instead relied on an implied warranty of habitability in residential leases. Caveat emptor was rejected. *Id.* at 432, 462 P.2d at 473.

See Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), *noted in* 84 HARV. L. REV. 729 (1971), 66 Nw.

consumer protection law,[36] and legislative policy.[37] It is also reasonable in view of the superiority of the landlord's bargaining position in contemporary housing shortages,[38] and the landlord's presumably superior knowledge of defects in his property.[39]

In 1969 the Missouri legislature enacted the Enforcement of Minimum Housing Code Standards Act.[40] Pursuant to this statute, if a landlord fails to correct a housing code violation within a reasonable time after notice, an enforcement agency or specified number of tenants can collect rent and encumber the property to make the repairs. *King* stated that this statute effectively reads into every residential lease a standard of habitability based on the local housing code and coerces landlords to make repairs for the health and safety of their tenants.

King viewed a lease as creating an ordinary contractual relationship. The court stated:

> [A] lease is not only a conveyance but also gives rise to a contractual relationship between the landlord and tenant from which the law implies a warranty of habitability and fitness by the landlord. Under contract principles a tenant's obligation to pay rent is dependent upon the landlord's performance of his obligation to provide a habitable dwelling during the tenancy.[41]

U.L. REV. 227 (1971), and 1970 WASH. U.L.Q. 499. The court held that a warranty of habitability, in accord with the housing regulations, is implied in leases of urban dwellings. A breach of this warranty gives rise to the usual contract remedies. The court stated that contract principles establish a more rational framework for apportionment of tenant-landlord responsibilities and suggested that the principles of consumer protection cases could be applied to leases.

36. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969).

37. "The legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone." Altz v. Leiberson, 233 N.Y. 16, 19, 134 N.E. 703, 704 (1922) (Cardozo, J.). *But see* Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970), where the court decided that the legislature did not intend for such strict standards as those in the housing regulations to be incorporated into leases as an implied warranty of habitability. Similarly, in Lindsey v. Normet, 405 U.S. 56, 74 (1972), the United States Supreme Court said "[T]he assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." The *King* opinion also failed to consider the 1971 defeat in the Missouri House of Representatives of proposed legislation which was intended to imply a warranty of fitness in residential property leases. H.B. 695, 76th Mo. Legis., 1st Sess. (1971).

38. *See* cases cited note 36 *supra*.

39. Kline v. Burns, 111 N.H. 87, 91, 276 A.2d 248, 251 (1971); Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).

40. §§ 441.500-640, RSMo 1973 Supp. *See also* Annot. 40 A.L.R.3d 821 (1971).

41. 495 S.W.2d at 75; *accord*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Springs, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Foisy v. Wyman, — Wash. 2d —, 515 P.2d 160 (1973). *See also* 40 A.L.R.3d 646 (1971); Annot. 40 A.L.R.3d 1356 (1971).

King makes all the traditional contract remedies available to the tenant, *i.e.*, recession, reformation, and damages, where the tenant can meet the requirements: a material breach[42] of the implied warranty of habitability; notice to the landlord of all alleged hidden defects; allowance of a reasonable time for repair by the landlord; and, absence of wrongdoing by the tenant as to this material breach.[43]

If the *King* requirements are met, damages will be measured by the difference betwen the fair rental value of the premises if they had been as warranted and the fair rental value of the premises in their actual condition.[44] Therefore, contrary to prior decisions, *King* allows the tenant to retain possession of the premises without paying rent[45] to the landlord until habitability is restored. The tenant may then set-off the difference in the landlord's action for contract rent.

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42. [Materiality is] determined by factors, among others, of the nature of the deficiency or defect, its effect on the life, health, or safety of the tenant, length of time it persisted and the age of the structure. Minor housing code violations which do not affect habitability will be considered de minimus. Also, the violation must affect the tenant's dwelling unit or the common areas which he uses.

495 S.W.2d at 76; *accord*, Reese v. Diamond Housing Corp., 259 A.2d 112 (D.C. Ct. App. 1969); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1970); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

43. 495 S.W.2d at 76. In *King*, the city health department inspected and confirmed the housing code violations, but the court does not make this a requirement of the defense. Although *King* measures the standard of habitability by the local housing code, it is reasonable to expect the remedy to be extended from city slums to sub-standard housing in areas not covered by a housing code. Courts in such areas might imply a standard based on the life, health, or safety of the tenant.

44. If the tenant vacates, his damages for breach are limited to the benefit of his bargain, or the value of his lease. He can counterclaim only for the difference, if any, between rental value of the premises as warranted and the contract rent for the unexpired term of the lease. *Id.* at 76; Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971); 11 S. WILLISTON, CONTRACTS § 1404, at 562 (3d ed. 1968); *see* note 28 *supra*.

Justice Douglas discussed Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (*See* note 35 *supra*) in his dissent and implied that Oregon follows Javins in treating leases as contracts. The cases he cited, however, were not expressly determined on such bold grounds: Wright v. Bauman, 239 Ore. 410, 398 P.2d 119 (1965) (contract to make a lease); Eggen v. Wetterborg, 193 Ore. 145, 237 P.2d 970 (1951) (premises destroyed by fire, impossibility of performance).

45. "A tenant who retains possession, however, shall be required to deposit the rent as it becomes due, *in custodia legis* pending the litigation." 495 S.W.2d at 77. This is to insure that the money will be available for repairs and to encourage the landlord to mitigate damages by making early repairs. The court may authorize a partial pretrial payment to the landlord for good cause.

King thus seems to require payment into the court, in contrast to the cases it cites which say the trial court "may" require payment in custodia legis as the rent becomes due. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083, n.67 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Hinson v. Delis, 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661, 699 (1972). *See also* Lindsey v. Normet, 405 U.S. 56 (1972) (Douglas, J., dissenting opinion). Requiring the payment

The defendant in *King* also argued that no rent was properly due because the lease was an illegal contract inasmuch as it was based on knowing violations of the housing code.[46] The court agreed that the lease was unenforceable in this respect, but that the landlord could still recover the reasonable rental value of the premises in their actual condition during occupancy.[47] Otherwise, landlords would be deprived of a resource for restoration and might abandon instead of repair their substandard housing.[48]

The *King* decision, giving the slum tenant a new contract remedy,[49] is

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may cause problems when a court refuses to accept rent payments, as did the Magistrate Court of Boone County, Missouri, in a case in which the tenant relied on *King*. Sowers v. A., A. & M. Partnership, Case number 73-951 (Mo. Div. II, 1973) (decision pending).

Another approach was used in Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), where the tenant repaired the defect herself and deducted the cost from her rent payment. The court held that this self-help defense was valid against the landlord's rent action. Annot. 40 A.L.R.3d 1369 (1971). *Contra,* Ferro v. Ferrante, 103 R.I. 680, 240 A.2d 722 (1968).

46. This defense is not available when the violations occur after the lease is signed.

47. The usual view is that the recovery is not based on the illegal contract, but on a tenancy at will that is created by operation of law when the tenant takes possession under an illegal lease. Diamond Housing Corp. v. Robinson, 257 A.2d 492, 495 (D.C. Ct. App. 1969).

A tenant is apparently not limited to a counterclaim but may also initiate a suit for damages and recover rent already paid to the landlord in excess of actual rental value of the uninhabitable premises. In Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972), the tenant was entitled to an injunction to prevent the landlord from filing an eviction action, and a declaratory judgment that she was obligated to pay rent only after the landlord had made the premises habitable.

But in Lindsey v. Normet, 405 U.S. 56 (1972), the Court refused the tenant's request for a declaratory judgment that Oregon's eviction statute (ORE. REV. STAT. ch. 105) was unconstitutional because it did not allow them to present a defense of landlord's failure to maintain the premises, or to suspend rent payments until claims against the landlord were litigated. Justice White, expressing the opinion of five members of the Court, said that covenants in Oregon leases were independent and that it was up to the state to determine landlord-tenant relationships. For this reason the Court held that the statute did not violate due process or equal protection in limiting tenant's defenses. The *King* court, however, said it preferred to base its decision allowing the landlord reasonable rental value despite the illegal contract "openly on hard reality," *i.e.*, that otherwise landlords would be deprived of a source of funds with which to improve their properties. 495 S.W.2d at 79.

The court also required that, on remand, defendant elect before judgment between her two inconsistent affirmative defenses because one alleged illegality of the contract and the other sought to enforce a breach of that contract. *Id.* at 79.

48. 495 S.W.2d at 79.

49. *See* Note, *Contract Principles and Leases of Realty,* 50 B.U.L. REV. 24 (1970); Comment, *Landlord and Tenant–Implied Warranty of Habitability–Demise of the Traditional Doctrine of Caveat Emptor,* 20 DEPAUL L. REV. 955 (1971); Note, *Implied Warranty of Habitability in Housing Leases,* 21 DRAKE L. REV. 300 (1972); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?,* 40 FORDHAM L. REV. 123 (1971);

consistent with recent decisions in other jurisdictions and with the modern reality of the landlord-tenant relationship. By finding an implied warranty of habitability in residential leases, the court has responded effectively to a substantial social problem.

JAMES GROSS

MALICIOUS PROSECUTION—— REBUTTING PRESUMPTION OF PROBABLE CAUSE FOR PREVIOUS PROSECUTION

Moad v. Pioneer Finance Co.[1]

Missouri decisions have consistently stated that actions for malicious prosecution are not favorites of the law,[2] and *Moad v. Pioneer Finance Co.* reaffirms this. The plaintiff, a former office manager of the defendant loan company, was charged with making a false financial statement regarding property owned by prospective borrowers in order that they be able to procure a loan from defendant. After the plaintiff left defendant's employ, the defendant hired an attorney to investigate its delinquent accounts. On completion of the investigation, the attorney, believing that the facts concerning the loan should be investigated criminally, furnished the Prosecuting Attorney of Webster County, Missouri, with the records and statements taken during his investigation. The attorney did not request the prosecutor to file charges nor was he directed to do so. A complaint charging the plantiff was signed by the prosecuting attorney and supported by his personal affidavit that its facts were true and correct according to his best information and belief.

The complaint was dismissed by the magistrate court, because it failed to state facts sufficient to constitute an offense. Subsequently, the plaintiff sued the defendant for malicious prosecution, alleging that the defendant maliciously and without probable cause instituted the previous prosecution against him. At the close of plaintiff's case, the trial court directed verdict for defendant. The Missouri Supreme Court affirmed.[3]

Malicious prosecution is an action in tort to recover for injury done to the plaintiff's person, property, or reputation as a result of a previous proceeding initiated against him by the defendant—allegedly in a misuse of the legal process.[4] The elements of the action are:

Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966); Comment, *Plotting the Long-Overdue Death of Caveat Emptor in Leased Housing*, 6 U. SAN. FRAN. L. REV. 147 (1971); Comment, *Tenant Remedies–The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710 (1971).

1. 496 S.W.2d 794 (Mo. 1973).

2. Bonzo v. Kroger Grocery & Baking Co., 344 Mo. 127, 134, 125 S.W.2d 75, 79 (1939).

3. 496 S.W.2d at 799.

4. *See* W. PROSSER, THE LAW OF TORTS § 119 (4th ed. 1971).

(1) The commencement or prosecution of the proceeding against the plaintiff; (2) its legal causation by the defendant;[5] (3) its termination in favor of the plaintiff;[6] (4) the absence of probable cause for such proceeding;[7] (5) the presence of malice therein;[8] and (6) damage resulting to the plaintiff by reason thereof.[9] The burden is on the plaintiff to strictly and clearly prove all of the necessary elements of his cause of action.[10] In considering a motion for a directed verdict, however, the evidence is viewed most favorably to the plaintiff,[11] and he is given the benefit of every reasonable inference.[12]

In *Moad,* the trial court's judgment for the defendant was based on the plaintiff's failure to establish two of the elements of his cause of action: legal causation by the defendant and absence of probable cause. The Missouri Supreme Court limited its discussion to the element of absence of probable cause, holding (1) that no inference of want of probable cause arose from the dismissal of the complaint in the magistrate court, and (2) that an information based on the prosecuting attorney's personal affidavit establishes a prima facie showing of probable cause.

In regard to *Moad's* first holding, the Missouri malicious prosecution cases differ somewhat on the inferences of want of probable cause that may be drawn from the manner of termination of the previous criminal charge against the plaintiff. The majority rule, followed for the most part in Missouri, is that abandonment by,[13] or discontinuance at the instance of, the prosecuting attorney,[14] dismissal by the court, or acquittal of the

5. The defendant must have acted affirmatively and been instrumental in instituting the prior proceeding against the plaintiff. *See* Bellington v. Clevenger, 228 S.W.2d 817 (K.C. Mo. App. 1950).

6. The prior proceeding cannot be pending when the suit for malicious prosecution is filed; the plaintiff has no cause of action unless there has been an acquittal or other final determination in his favor. *See* Euge v. Lemay Bank & Trust Co., 386 S.W.2d 398 (Mo. 1965).

7. Want of probable cause is usually the determinative element in the action. *See* Randol v. Kline's Inc., 322 Mo. 746, 18 S.W.2d 500 (1929); Standley v. Western Auto Supply Co., 319 S.W.2d 924 (K.C. Mo. App. 1959). The existence of probable cause is a complete defense, even if the defendant acted with malice. *See* Dawes v. Starrett, 336 Mo. 897, 82 S.W.2d 43 (1935).

8. Malice may be inferred from the want of probable cause. *See* Hughes v. Aetna Ins. Co., 261 S.W.2d 942 (Mo. 1953).

9. Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 1025, 74 S.W.2d 805, 812 (1934).

10. O'Donnell v. Chase Hotel, Inc., 388 S.W.2d 489, 494 (St. L. Mo. App. 1965). Whether the plaintiff has made a submissible case on the issue of the absence of probable cause is a question of law for the court. Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 1026, 74 S.W.2d 805, 812 (1934). If want of probable cause is affirmatively shown, however, the burden shifts to the defendant to show that he acted without malice. Coleman v. Ziegler, 226 S.W.2d 388 (St. L. Mo. App. 1950).

11. Huffstutler v. Coates, 335 S.W.2d 70, 73 (Mo. 1960).

12. Knost v. Terminal R. Ass'n, 222 S.W.2d 593, 596 (St. L. Mo. App. 1949).

13. *See* RESTATEMENT OF TORTS § 665 (1938).

14. *See* Annot., 59 A.L.R.2d 1413, 1429 (1958).

plaintiff[15] is insufficient to make a prima facie or submissible case on the absence of probable cause.[16] In *Moad,* the felony complaint was dismissed for failure to charge a crime.[17] Relying on *Harper v. St. Joseph Lead Co.,*[18] in which the prosecuting attorney had *nolle prosequied*[19] the charge against the plaintiff, the court in *Moad* held that no inference of want of probable cause arose from the dismissal, without a preliminary examination on the merits, of the complaint in the magistrate court.[20]

To understand the second, and primary, holding in *Moad,* it is necessary to briefly outline the means by which an individual may be charged with a criminal offense. The Missouri Constitution provides that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information . . . ."[21] The procedure required in filing an information is outlined in section 545.240, RSMo 1969.[22] The prosecuting attorney must file all informations. They must be verified either by his oath or that of an individual competent to testify as a witness who has actual knowledge of the circumstances or events.[23] Verification by the prosecutor may be based on his statement that the facts in the information are true according to his best information and belief.

In *Moad,* the attorney hired by the defendant gave copies of the company's records to the prosecuting attorney, who then conducted his own investigation of plaintiff's allegedly false financial statement. The complaint against the plaintiff was supported by the prosecuting attorney's personal affidavit; the defendant was not regarded as the prosecuting witness.

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15. Knost v. Terminal R. Ass'n, 222 S.W.2d 503, 507 (St. L. Mo. App. 1949); Eckerle v. Higgins, 159 Mo. App. 177, 140 S.W. 616 (Spr. Ct. App. 1911). But, an acquittal is evidence of want of probable cause and, if supplemented by other facts and circumstances, can establish same.

16. A prima facie case is established where the plaintiff is discharged by an examining magistrate at a preliminary hearing. *See* Eckerle v. Higgins, 159 Mo. App. 177, 140 S.W. 616 (Spr. Ct. App. 1911). Arguably, this is only true where the magistrate has jurisdiction merely to discharge the accused or to bind him over for trial. *See* Annot., 59 A.L.R.2d 1413, 1435 (1958).

17. 496 S.W.2d at 798.

18. 361 Mo. 129, 233 S.W.2d 835 (1950).

19. A formal entry by the prosecuting attorney that he will not further prosecute the case, in whole or in part. BLACK'S LAW DICTIONARY 1198 (4th ed. 1951).

20. 496 S.W.2d at 799. *See also* Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 74 S.W.2d 805 (1934).

21. MO. CONST. art. I, § 17.

22. § 545.240, RSMo 1969, provides:

> All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief.

23. State v. Statler, 383 S.W.2d 534, 536 (Mo. 1964). When the information signed by the prosecuting attorney is based on an affidavit of an individual, "the person who made such affidavit shall be deemed the prosecuting witness." § 545.280, RSMo 1969. After a prosecuting witness has filed an affidavit, the prosecuting attorney may disregard it and verify the information on his information and belief. *See* State v. Rotter, 193 Mo. App. 110, 181 S.W. 1158 (St. L. Ct. App. 1916).

Prior Missouri decisions have established that the return of an indictment by a grand jury is prima facie evidence of probable cause in an action for malicious prosecution.[24] The term "prima facie evidence" has been used to signify the equivalent of a presumption,[25] that becomes conclusive unless rebutted by the plaintiff. Noting the rule applicable to grand jury indictments, the court in *Pinson v. Campbell*[26] stated:

> On parity of reason, the filing of an information by a prosecuting attorney on his own information and belief is prima facie evidence of probable cause, but not so when the information is predicated on the affidavit of the complaining witness.[27]

Nevertheless, *Pinson* was not mentioned in *Higgins v. Knickmeyer-Fleer Realty & Investment Co.*,[28] apparently overruled in part by *Moad.* There the plaintiff was not required to rebut a presumption of probable cause even though the prosecuting attorney verified the information against her. The court said that "this is not a case where an indictment was returned by a grand jury . . . ."[29] whch would constitute prima facie evidence of probable cause. *Moad* is the first case to directly rely on the *Pinson* dictum to establish that the prosecuting attorney's verification of the information creates a prima facie showing of probable cause.[30]

The plaintiff's mere allegation of want of probable cause as an ultimate fact is sufficient[31] to state a cause of action for malicious prosecution where the previous felony complaint was verified by a prosecuting witness only. The return of an indictment[32] or an information filed with the prosecuting attorney's own affidavit, however, requires pleading sufficient facts to rebut the presumption of probable cause. The prevailing rule is that the plaintiff must prove that the defendant procurred the indictment or information by false or fraudulent testimony, the intentional concealment of material facts, or other improper means, or that he did not believe the plaintiff to be guilty.[33]

Two other situations create a prima facie case of probable cause: where an examining magistrate found probable cause to prosecute the plaintiff, and where plaintiff's conviction in the original proceeding was reversed on

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24. Harper v. St. Joseph Lead Co., 361 Mo. 129, 139, 233 S.W.2d 835, 839-40 (1950). *See also* Annot., 28 A.L.R.3d 748 (1969).

25. Mannisto v. Rainen Furniture Co., 295 S.W.2d 841, 845 (K.C. Mo. App. 1956).

26. 124 Mo. App. 260, 101 S.W. 621 (St. L. Ct. App. 1907).

27. *Id.* at 269, 101 S.W. at 624.

28. 335 Mo. 1010, 74 S.W.2d 805 (1934).

29. *Id.* at 1025, 74 S.W.2d at 812.

30. 496 S.W.2d at 798.

31. Ripley v. Bank of Skidmore, 335 Mo. 897, 902, 198 S.W.2d 861, 865 (1947).

32. *See* Wilkirson v. McGhee, 178 S.W. 471 (Mo. 1915).

33. Dawes v. Starrett, 336 Mo. 897, 922, 82 S.W.2d 43, 55 (1935). *See also* Sharpe v. Johnston, 76 Mo. 660, 670 (1882); Firer v. Lowery, 59 Mo. App. 92 (St. L. Ct. App. 1894).

appeal.[34] Here also the plaintiff must plead and adduce substantial evidence[35] to avoid a directed verdict for the defendant.[36]

Although one Missouri case said that the existence of prima facie evidence of probable cause means "no more than to say the burden of proof to show want of probable cause is upon the plaintiff,"[37] it is apparent from the cases that the plaintiff's burden is actually much greater. To prove want of probable cause, the plaintiff need only show that the circumstances would not warrant an ordinarily prudent person in the defendant's position believing that the plaintiff was guilty of the offense charged.[38] To rebut a "prima facie presumption"[39] of probable cause, however, the plaintiff must show, not only that the defendant acted unreasonably by an objective standard, but also that the defendant did not actually believe the plaintiff was guilty. Alternatively, the plaintiff can prove that false testimony was given or that material facts were concealed, but in addition must prove that the defendant could have discovered this by reasonable diligence.[40] Whichever the plaintiff attempts to show, his burden is greater than simply showing defendant acted unreasonably.[41]

The Missouri courts, in their aversion to malicious prosecution actions, have restricted its maintenance through their definition of the plaintiff's burden of proof. *Moad*, by allowing informations filed by the prosecuting attorney with his own affidavit to be prima facie evidence of probable cause, has greatly increased plaintiff's burden of proof in such cases, and seemingly insulated from liability the defendant who has instigated a criminal prosecution of the plaintiff but has not verified the complaint as prosecuting witness.

W. DUDLEY MCCARTER

34. O'Donnell v. Chase Hotel, Inc., 388 S.W.2d 489, 492 (St. L. Mo. App. 1965). The majority rule is that a conviction in the original proceeding is conclusive evidence of probable cause even though reversed on appeal. Although this is only prima facie evidence in Missouri, a distinction between the majority rule and the Missouri, or minority, rule is difficult to draw because the conviction under the majority rule is conclusive only if there was no fraud or false testimony. *See* 54 C.J.S. *Malicious Prosecution* § 38 (1948).

35. Dawes v. Starrett, 336 Mo. 897, 923, 82 S.W.2d 43, 55 (1935). *See generally* Annot., 14 A.L.R.2d 264 (1950).

36. Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 1026, 74 S.W.2d 805, 812 (1934).

37. Peck v. Chouteau, 91 Mo. 138, 149, 3 S.W. 577, 580 (1887).

38. Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 1026, 74 S.W.2d 805, 813 (1934).

39. Kvasnicka v. Montgomery Ward & Co., 350 Mo. 360, 378, 166 S.W.2d 503, 513 (1942).

40. Kvasnicka v. Montgomery Ward & Co., 350 Mo. 360, 367, 374, 166 S.W.2d 503, 506, 510 (1942). Dawes v. Starrett, 336 Mo. 897, 922, 82 S.W.2d 43, 55 (1935). *See* Wilkirson v. McGhee, 265 Mo. 574, 178 S.W. 471 (1915); Annot., 28 A.L.R.3d 748, 773 (1969).

41. *See e.g.*, Davidson v. Montgomery, 232 S.W.2d 816 (St. L. Mo. App. 1950) (verdict should have been directed for the defendant since there was no evidence that he falsely testified). *Accord*, Harper v. St. Joseph Lead Co., 361 Mo. 129, 233 S.W.2d 835 (1950).

RULE 27.26 MOTIONS—WHEN IS AN EVIDENTIARY HEARING REQUIRED?

Colbert v. State[1]

Victor Colbert pleaded guilty to charges of robbery, burglary, and stealing and was sentenced to thirty years imprisonment. He later moved to vacate his guilty plea under Supreme Court Rules 27.25 and 27.26.[2] The trial court held an evidentiary hearing[3] and denied the motion to vacate. On appeal, the Missouri Supreme Court denied relief solely on the basis of the record made by the trial court at the time the guilty plea was given.[4] The court held that where that record is sufficiently complete to show that the plea was knowing and voluntary, an evidentiary hearing on the 27.26 motion is not required.[5]

The purpose of this note is to determine when a defendant is entitled to an evidentiary hearing on his motion under Supreme Court Rule 27.26 to vacate his previous guilty plea.

The validity of a guilty plea can be challenged for a limited number of reasons. The Supreme Court recognized in *Brady v. United States*[6] that a guilty plea breaks the chain of events that preceded it in the criminal process. A valid guilty plea therefore waives certain constitutional claims concerning the treatment of the defendant prior to his plea[7] and limits post-conviction relief (including a 27.26 motion) to an attack on the voluntary and intelligent character of the plea or events arising thereafter.

Both Missouri Supreme Court Rule 25.04 and Rule 11 of the Federal Rules of Criminal Procedure require that the trial judge determine, before accepting a guilty plea, that it is made "voluntarily with understanding of

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1. Two cases: 486 S.W.2d 219 (Mo. 1972); 496 S.W.2d 12 (Mo. En Banc 1973).

2. Mo. Sup. Ct. R. 27.25 authorizes a motion to withdraw a guilty plea before sentence, and after sentence only where necessary to correct "manifest injustice". Mo. Sup. Ct. R. 27.26 deals with post-conviction relief.

3. Mo. Sup. Ct. R. 27.26(e) states:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. . . . This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of the records of the court, that issue shall be determined in the evidentiary hearing. . . .

4. 486 S.W.2d at 221.

5. *Id.*

6. 397 U.S. 742 (1970).

7. Tollett v. Henderson, 411 U.S. 258 (1973) (waiver of the right to a constitutionally selected grand jury); McMann v. Richardson, 397 U.S. 759 (1970) (waiver of the right to contest the admissibility of evidence offered against the defendant); McCarthy v. United States, 394 U.S. 459 (1969) (waiver of the privilege against compulsory self-incrimination, right to a jury trial, and the right of confrontation). For a complete discussion see Annot., 25 L. Ed. 2d 1025 (1971).

the nature of the charge."[8] The constitutional considerations applicable to guilty pleas were announced in *Boykin v. Alabama*,[9] in which the Supreme Court held that 14th amendment due process requires that the defendant voluntarily and understandingly entered his guilty plea.[10] In dictum the Court said that where the trial judge has complied with Rule 11, the constitutional requirement is satisfied and there is "a record adequate for any review that may be later sought."[11]

Prior to *Colbert* Missouri appellate courts considered both the trial court's guilty plea record and the evidentiary hearing record to determine voluntariness.[12] One commentator has recently predicted, based on *Boykin*, that appellate courts will restrict their review in the future to the guilty plea record.[13] Further, *Boykin* allows trial courts to satisfy the constitutional requirement and still avoid post-conviction evidentiary hearings by holding that "the record of the plea proceeding is conclusive on the issue of whether the plea was entered voluntarily and understandingly."[14]

The unanswered question is "Under what circumstances does the guilty plea record conclusively establish voluntariness?"

In deciding *Colbert*, the court said that "because of the record made at the trial court . . . [*Colbert*] presents the court with an opportunity to

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8. In Flood v. State, 476 S.W.2d 529, 536 (Mo. 1972), the court discussed Mo. Sup. Ct. R. 25.04 and Fed. R. Crim. P. 11. Rule 25.04 states:

> A defendant may plead not guilty or guilty. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.

Fed. R. Crim. P. 11 is almost identical. The court held that strict compliance with Rule 25.04 is not mandatory. 476 S.W.2d at 533. Federal courts have held to the contrary concerning Rule 11. *See* McCarthy v. United States, 394 U.S. 459 (1969).

In his concurring opinion in *Flood*, Judge Donnelly proposed a procedure for conducting a guilty plea proceeding which closely parallels a federal court procedure recommended in United States v. Cody, 438 F.2d 287 (8th Cir. 1971). The procedure is essentially a detailed sequence of questions the judge should ask the defendant, and is set forth at 476 S.W.2d 535, 536. Judge Donnelly thought that Boykin v. Alabama, 395 U.S. 238 (1969), and State v. Turley, 443 F.2d 1313 (8th Cir.), *cert. denied*, 404 U.S. 965 (1971), "invite[s] the trial judge[s] of Missouri to utilize [this] procedure which could insulate most guilty pleas from successful subsequent attack in Rule 27.25 and 27.26 proceedings, and in federal habeas corpus proceedings." 476 S.W.2d at 537.

9. 395 U.S. 238 (1969).

10. *Id.* at 242.

11. *Id.* at 244.

12. Robinson v. State, 482 S.W.2d 492 (Mo. 1972); Flood v. State, 476 S.W.2d 529 (Mo. 1972); Brown v. State, 473 S.W.2d 683 (Mo. 1971); State v. Grimm, 461 S.W.2d 746 (Mo. 1971).

13. Anderson, *Post-Conviction Relief in Missouri - Five Years Under Amended Rule 27.26*, 38 Mo. L. Rev. 1 (1973). *See also* Finch, *Post-Conviction Proceedings Under Missouri Supreme Court Rule 27.26*, 50 F.R.D. 427, 437 (1970); Osterland, *New Criminal Procedure in Missouri*, 33 Mo. L. Rev. 302 (1968); Pelofsky & Purden, *Rule 27.26: A Study in Post-Conviction Remedies*, 39 U.M.K.C.L. Rev. 1 (1970).

14. Anderson, *supra* note 13, at 11.

eliminate from post-conviction judicial process in Missouri much unnecessary and time-consuming activity"[15] (*i.e.*, evidentiary hearings). The court, ignoring the results of the evidentiary hearing, announced that Rule 27.26(e) did not require a hearing because the guilty plea record disclosed that the plea was voluntary.[16] Thus, a record that complies with 25.04 can conclusively show that the movant is not entitled to relief.[17] Further, such a showing of voluntariness and understanding may, because it is constitutionally sufficient under *Boykin*, "insulate the convictions from subsequent attack in federal habeas corpus proceedings."[18] Relying on *Colbert*, Missouri trial courts have increasingly denied post-conviction hearings based on "complete" guilty plea records.[19]

A few months after *Colbert* the Supreme Court decided *Fontaine v. United States*.[20] Fontaine pleaded guilty to a charge of robbery in federal district court. Pursuant to Rule 11 of the Federal Rules of Criminal Procedure the judge questioned the defendant to determine the voluntariness of his guilty plea. He then accepted the plea and sentenced Fontaine to 20 years in prison. Two years later, Fontaine filed a petition seeking a writ of habeas corpus to vacate his sentence on grounds that his guilty plea had been induced by fear, illness, and coercion.[21] Because the requirements of Rule 11 had been met, the district court held that collateral attack was "per se" unavailable.[22]

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15. 486 S.W.2d at 220. For a further explanation of the record made at trial see Anderson, *supra* note 13, at 12-13 nn. 65-66.

16. 486 S.W.2d at 221. Mo. Sup. Ct. R. 27.26(e) requires an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . ."

17. The court does not say that this will be true in all cases.

18. 486 S.W.2d at 221. Fed. R. Crim. P. 11 is virtually identical to Mo. Sup. Ct. R. 25.04 (*see* note 8 *supra*); compliance with Rule 25.04 at trial should therefore insulate the plea from subsequent attack in federal court. State v. Turley, 443 F.2d 1313 (8th Cir.), *cert. denied*, 404 U.S. 965 (1971). *But see* notes 20-28 and accompanying text *infra*.

19. Henderson v. State, 487 S.W.2d 527 (Mo. 1972). *See also* Loflin v. State, 492 S.W.2d 770 (Mo. En Banc 1973); Simpson v. State, 487 S.W.2d 512 (Mo. 1972); Pauley v. State, 487 S.W.2d 565 (Mo. 1972); Betts v. State, 493 S.W.2d 361 (Mo. App., D. St. L. 1973); Moore v. State, 488 S.W.2d 266 (Mo. App., D.K.C. 1972).

It is apparent from *Betts* and *Loflin* that the trial court is not obligated to supply an indigent movant with counsel under Rule 26.26(h) in order to prepare a proper motion. Rule 27.26(h) authorizes the appointment of counsel if the already-prepared motion presents issues of fact and questions of law. For an interesting discussion see Judge Seiler's dissent in *Loflin*.

20. 411 U.S. 213 (1973).

21. *Id.* at 214. A motion for habeas corpus relief under 28 U.S.C. § 2255 (1970) closely resembles a motion under Mo. Sup. Ct. R. 27.26. § 2255 states:

> Unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

22. 411 U.S. at 214. This reasoning is very similar to that of *Colbert*. The federal trial judge seems to be following a broad interpretation of *Boykin*

On certiorari, the Supreme Court noted that the motion to vacate set out "detailed factual allegations" of physical abuse, prolonged interrogation, and serious illness and hospitalization resulting from heroin addiction and a gunshot wound, all of which allegedly transpired between his arrest and conviction.[23] The Court also noted that a hearing on the petitioners allegations was required by statute unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ."[24] The Court held: "On this record, we cannot conclude . . . that under no circumstances could the petitioner establish facts warranting relief under § 2255 . . . ."[25]

The government contended that the defendant could not later repudiate his representations of voluntariness made in open court when the guilty plea was accepted,[26] *i.e.*, that the guilty plea record was conclusive. The Court acknowledged that the purpose of Rule 11 (like Missouri Rule 25.04) was to "flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations."[27] *Fontaine* thus indicates that for purposes of habeas corpus petitions in federal court compliance with Rule 11 does not necessarily assure due process to the petitioner. Relying exclusively for a finding of voluntariness on the trial record may not be permissible where, as in *Fontaine*, the petition contains allegations which the guilty plea record cannot conclusively refute, or which amount to unusual circumstances.[28]

(*see* text accompanying notes 9-11 *supra*) and Larson v. Coiner, 351 F. Supp. 129 (N.D.W. Va. 1972). In *Larson* the court, recognizing a procedure outlined in prior decisions, stated that, absent unusual circumstances, if certain questions were asked concerning the voluntariness of the plea, then the state court record would be dispositive of post-conviction allegations of coercion.

Many federal courts throughout the country, however, have been unwilling to adopt the *Larson* rule and make compliance with Rule 11 conclusive as to the voluntariness of the plea. *E.g.*, in Jones v. United States, 384 F.2d 916 (9th Cir. 1967), the defendant's guilty plea was allegedly induced by coercive in-custody interrogation without a lawyer. The court held that compliance with Rule 11 should not bar a subsequent petition containing allegations of factual matters outside the record which the record could not conclusively resolve. *See also* Santobello v. New York, 404 U.S. 257 (1971) (false promises of leniency); Townsend v. Sain, 372 U.S. 293 (1963) (confession obtained by truth serum); Beavers v. Anderson, 474 F.2d 1114 (10th Cir. 1973) (threat of maximum sentence); Schoultz v. Hocker, 469 F.2d 681 (9th Cir. 1972) (false promises of leniency); Gallegos v. United States, 466 F.2d 740 (5th Cir. 1972) (false promises of leniency); Hillard v. Beto, 465 F.2d 829 (5th Cir. 1972) (false promises of leniency); Walters v. Harris, 460 F.2d 988, (4th Cir. 1972) (false promises of leniency); Reed v. United States, 441 F.2d 569 (9th Cir. 1971) (false promises of leniency); United States v. Rawlins, 440 F.2d 1043 (8th Cir. 1971) (unintelligent guilty plea).

23. Fontaine v. United States, 411 U.S. 213, 214 (1973).

24. *Id.* at 214. *See* note 21 *supra.*

25. *Id.* at 215. The Court relied heavily on Machibroda v. United States, 368 U.S. 487 (1962), which stresses the seriousness of the guilty plea and consequently the need that the plea be entered voluntarily.

26. Fontaine v. United States, 411 U.S. 213, 214 (1973).

27. *Id.* at 215.

28. *See* note 22 *supra.*

After *Fontaine,* Colbert sought a writ of habeas corpus in federal district court seeking to vacate his guilty plea. The district court construed *Fontaine* as establishing *constitutional* standards with which *Colbert* was inconsistent, and held in abeyance the habeas corpus proceeding to allow the Missouri Supreme Court to reconsider *Colbert.*[29] Otherwise, the district court would have to hold an evidentiary hearing because specific findings of fact and conclusions of law were not made on Colbert's post-conviction motion.[30]

Upon rehearing[31] (hereinafter *Colbert II*), the Missouri Supreme Court found that *Fontaine* was inapplicable because, unlike *Colbert II,* it involved an allegedly coerced plea.[32] Thus, the court reaffirmed its view that Colbert was not entitled to an evidentiary hearing.[33] As if unwilling to rely on this reading of *Fontaine,* however, the court examined the guilty plea record *and* the evidence from the evidentiary hearing that was in fact held by the trial court and determined that it showed that in any event Colbert was not entitled to relief.[34] The federal district court which had held its proceedings in abeyance thereafter denied the petition for a writ of habeas corpus, concluding that *Colbert II* was consistent with *Fontaine.*[35]

An outstanding weakness of *Colbert II* is that it purports to affirm *Colbert* while using as the basis for its decision evidence (from the

29. Memorandum and order entered. Colbert v. Swenson, No. 20741-1 (W.D. Mo., July 27, 1973).

30. *Id. See* Townsend v. Sain, 372 U.S. 293 (1963), which says that a federal judge is not absolutely bound by the state court's decision whether the movant is entitled to relief, but may use his own discretion and hold an evidentiary hearing. The federal court may also, if it disagrees with the state court, remand to the state court upon receiving a petition for habeas corpus. Garton v. Swenson, 266 F. Supp. 726 (W.D. Mo. 1967); State v. Garton, 396 S.W.2d 581 (Mo. 1965).

31. Colbert v. State, 496 S.W.2d 12 (Mo. En Banc 1973).

32. *Id.* at 13, 15. Colbert maintained that he was entitled to relief on five grounds: (1) Inadequate legal representation; (2) incarceration for one year without a trial (under $100,000 bail) during which time he was constantly being persuaded and harassed to enter a guilty plea; (3) false promises of a lenient sentence made by the prosecutor (note that this is the ground upon which federal courts have granted relief, *see* note 22 *supra*); (4) denial of an opportunity to see his probation report; and (5) failure of the trial court to grant an independent mental examination by a psychiatrist of his own choosing.

In response to these allegations, the court in *Colbert II* made their own findings of fact based on the guilty plea record and the evidentiary hearing record and conclusions of law: (1) The defendant did not act or rely on the promises or suggestions made by the prosecutor when he pleaded guilty, if such promises were made at all; (2) the facts show defendant made no effort to have a speedy trial and was himself responsible for much of the delay; (3) the facts do not support the claim that the prosecutor or defendant's own attorney made false promises as to the length of sentence; (4) defendant was not misled as to the way the pre-sentence investigation report would be handled; and (5) the facts do not support the claim that the court overlooked or failed to act on defendant's request for an independent psychiatric examination.

33. *Id.*

34. *See* note 33 *supra.*

35. Colbert v. Swenson, No. 20741-1 (W.D. Mo., July 27, 1973). Colbert has appealed the decision of the federal district court and the decision is now

evidentiary hearing) that would not be available if it (*Colbert*) were followed. Instead of relying solely on the guilty plea record to satisfy the constitutional requirement of voluntariness, *Colbert II* thoroughly examined and compared the allegations in the petition and the evidentiary hearing record.[36] As the dissent notes, courts, prosecutors, and defense counsel have, after *Colbert II*, no way of ascertaining whether the guilty plea record can conclusively establish voluntariness by simply conforming to Rule 25.04, or whether independent supporting records and perhaps an evidentiary hearing are required.[37]

A more fundamental question is whether *Fontaine* has any constitutional implications at all, and if so, how they apply to fact situations like *Colbert*. As noted, the district court from which Colbert sought habeas corpus believed *Fontaine* placed constitutional limits on review of petitions to vacate guilty pleas, but that *Colbert II*, because it considered evidence outside the guilty plea record (the evidentiary hearing) met those requirements.[38] The Missouri Supreme Court in *Colbert II* also believed that *Fontaine* established constitutional requirements.[39] Yet, it is permissible to confine *Fontaine* to simply construing the federal statute[40] as to when a guilty plea record is conclusive, and not speaking of due process at all. So viewed, *Fontaine* has no compulsory bearing on 27.26 motions in Missouri courts, the only constitutional requirements being those of *Boykin*, which simply requires that the pleas be voluntary.[41]

Regardless what *Fontaine* may require, the *Colbert* position of relying conclusively on a 25.04 record should be abandoned.[42] Judge Donnelly spoke of eliminating "from post-conviction judicial process in Missouri much unnecessary and time-consuming activity."[43] But is *Colbert* a means to this end? The Supreme Court in the trilogy of *Sanders v. United States*,[44] *Fay v. Noia*,[45] and *Townsend v. Sain*[46] referred to the need for evidentiary hearings in the state courts to consider alleged constitutional violations. If the state courts do not hold such hearings, there may be no record adequate for

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pending. The court of appeals will follow the "clearly erroneous" standard set forth in Missouri.

Mo. Sup. Ct. R. 27.26(j):

> Appellate review shall be limited to a determination of whether the findings, conclusions, and judgments of the trial court are clearly erroneous.

See United States v. Strother, 458 F.2d 424 (5th Cir. 1972); Martin v. United States, 399 F.2d 708 (5th Cir. 1968). The Eighth Circuit will reverse the trial court only upon finding an abuse of discretion. *See* United States v. Rawlins, 440 F.2d 1043, 1044 (8th Cir. 1971).

36. *See* note 32 *supra*.

37. 496 S.W.2d at 16.

38. *See* notes 29-35 and accompanying text *supra*.

39. Hence, the court is obliged to distinguish *Fontaine*.

40. 28 U.S.C. § 2255 (1973), quoted note 21 *supra*.

41. *See* text accompanying note 9-11 *supra*.

42. Again, *Colbert* does not expressly apply to all fact situations, but its tenor leaves little room for different procedures.

43. 486 S.W.2d at 220.

44. 373 U.S. 1 (1963).

45. 372 U.S. 391 (1963).

46. 372 U.S. 293 (1963).

any review that may be later sought[47] in federal habeas corpus proceedings in light of *Fontaine*. The federal courts would then be compelled to hold evidentiary hearings or remand the case to the trial court to do so.

Missouri courts would be well-advised to follow the guidelines established for the federal courts in the Fourth Circuit. In *Raines v. United States*[48] the court suggested three possible methods of disposing of motions for habeas corpus relief.[49] The first, summary disposition, would be appropriate if the petition is "frivolous or patently absurb on its face."[50] The court could enter dismissal on its own motion without requiring a responsive pleading from the government. Second, depending on the nature of the allegations, the court might appropriately require that the record be expanded to include letters, documents, affidavits, and other evidence not previously a part of the guilty plea record.[51] Third, an evidentiary hearing might be required in some cases, particularly where the petitioner has alleged grounds for relief that cannot be conclusively refuted by reference to the guilty plea record or an expanded record.[52] The need for the hearing and the petitioner's presence would be left to the discretion of the trial court.[53]

Both Rule 11 of the Federal Rules of Criminal Procedure and Missouri Supreme Court Rule 25.04 are intended to promote a complete record of the factors relevant to the voluntariness of the guilty plea and, thereby, to

47. Boykin v. Alabama, 395 U.S. 238 (1969).

48. 423 F.2d 526 (4th Cir. 1970).

49. The court would apply these guidelines to *all* habeas corpus proceedings, regardless of grounds upon which relief is sought or whether the defendant pleaded guilty at trial.

50. *Id.* at 529.

51. *See* Machibroda v. United States, 368 U.S. 487 (1962) (visitor and mail records); United States v. Carlino, 400 F.2d 56 (2d Cir. 1968) (correspondence and other exhibits); Castro v. United States, 396 F.2d 345 (9th Cir. 1968) (affidavit from movant's trial counsel); Mirra v. United States, 379 F.2d 782 (2d Cir. 1967) (affidavit from movant's physician).

For a vigourous discussion opposing the admissibility of ad hoc affidavits see Judge Sobeloff's dissent in Raines v. United States, 423 F.2d 526 (4th Cir. 1970).

52. *See, e.g.*, Walters v. Harris, 460 F.2d 988 (4th Cir. 1972). The defendant filed a petition for a writ of habeas corpus claiming that his guilty plea was induced by an unkept promise made by the government in the plea bargaining session. The government denied the allegation and both parties submitted affidavits from various witnesses supporting their respective positions. The issue being one of credibility, the appellate court remanded the case and advised the district court conduct a full evidentiary hearing. The court stated that ordinarily the method of inquiry—affidavits, interrogatories, depositions, etc.—is left initially to the discretion of the trial court. For discussion of the issue of credibility and its bearing on the necessity for a full evidentiary hearing see Judge Winter's dissent in Walters v. Harris, *supra*, at 994, 995.

53. United States v. Hayman, 342 U.S. 205 (1952) held:

> Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing.

Id. at 223.

reduce subsequent attacks.[54] But to say that compliance with Rule 25.04 forecloses the issue of voluntariness is a mistake. The Supreme Court in *Fontaine* has concluded this much in an analogous situation involving the federal statute. *Colbert II* should be viewed as a reconsideration of *Colbert* and a withdrawal from the position that compliance with Rule 25.04 insures voluntariness.

MIKE GODAR

SECURED TRANSACTIONS–DECRIPTION OF COLLATERAL IN SECURITY AGREEMENT UNDER UNIFORM COMMERCIAL CODE SECTION 9-203 AND 9-110

In re Laminated Veneers Co.[1]

A security agreement executed pursuant to a loan from Commercial Trading Company to Laminated Veneers covered explicity certain items (including a truck) in one schedule and covered other items generally in an omnibus clause purporting to secure accounts receivable, inventory, fixtures, machinery, equipment and tools.[2] Subsequently Laminated Veneers was adjudged bankrupt and its property sold.[3] Both the trustee in bankruptcy and the secured creditor claimed the proceeds from the sale of two automobiles not specifically listed in the security agreement. Relying on the definition of "equipment" contained in Uniform Code section 9-109(2),[4] the secured creditor contended that the omnibus clause included the two automobiles and that he was therefore entitled to the sale proceeds.

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54. The record, or an expanded one, was sufficient in the following cases: Winstead v. United States, 460 F.2d 988 (4th Cir. 1972); Harris v. United States, 436 F.2d 591 (10th Cir. 1971); Ketchum v. United States, 327 F. Supp. 768 (D. Md. 1971); Weathers v. United States, 312 F. Supp. 1353 (D.S.C. 1970).

1. 471 F.2d 1124 (2d Cir. 1973).

2. The omnibus clause provided that:

> In addition to all the above enumerated items, it is the intention that this mortgage shall cover all chattels, machinery, equipment, tables, chairs, work benches . . . and all other items of equipment and fixtures belonging to the mortgagor, whether herein enumerated or not, now at the plant of Laminated Veneers Co., Inc. . . . and all chattels, machinery, fixtures, or equipment that may hereafter be brought in or installed in said premises. . . .

Id. at 1125 n.1.

3. CCH SECURED TRANSACTIONS GUIDE, NEW DEVELOPMENTS (1969-1973 Transfer Binder) ¶51,448, 66,399.

4. Unless otherwise indicated, all section references are the UNIFORM COMMERCIAL CODE (1962). N.Y. UNIFORM COMMERCIAL CODE § 9-109(2) (McKinney 1964), identical to UNIFORM COMMERCIAL CODE § 9-109(2) (1962), provides:

> Goods are
>
> . . . .
>
> (2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods. . . .

The referee in bankrupty found that the security agreement did not cover the automobiles and awarded the proceeds to the trustee in bankruptcy. A federal district court affirmed the referee's findings, and in turn was affirmed by the Second Circuit Court of Appeals.[5]

Article 9 of the Uniform Commercial Code supercedes prior law governing conditional sales, chattel mortgages, trust receipts, factor's liens, and assignments of accounts receivable and regulates all transactions in which debts are secured by personal property.[6] Article 9 is a response to the need for greater uniformity in regulating secured transactions; it seeks to provide one set of rules under which commercial transactions can be conducted with simplicity, sufficient disclosure, and certainty.[7] Implicit in all provisions of Article 9 are two basic goals: (1) that a secured party's interest should be safeguarded against a debtor's inability to pay, and (2) that notice of a security interest should be provided to third parties.[8]

A valid security interest under the Uniform Commercial Code, Section 9-203(a), requires that the collateral be either in the possession of the secured party or that the debtor have signed a security agreement containing a description of the collateral.[9] The purpose of this requirement is evidentiary. A writing minimizes the the possibility of a future dispute over the terms of the agreement or the identity of the collateral. Where the collateral is in the possession of the secured party, however, there is less evidentiary need for a written record and a writing is not required.[10] Noncompliance with Section 9-203(1) renders the security interest unenforceable against both the debtor and third parties.[11]

Section 9-302 imposes an additional requirement for the security interest to be enforceable against various third parties: public notice if the transaction involves nonpossessory security interests in certain types of personal property.[12] Public notice is given by filing a financing statement[13]

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5. 471 F.2d at 1124.

6. UNIFORM COMMERCIAL CODE § 9-101, Comment.

7. O. SPIVAK, SECURED TRANSACTIONS (UNDER THE UNIFORM COMMERCIAL CODE) 3 (3d ed. 1963). This basic purpose applies particularly to Article 9. See UNIFORM COMMERCIAL CODE § 9-101, Comment, which provides:

> The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.

8. 1 CCH SECURED TRANSACTIONS GUIDE, SECURED TRANSACTIONS EXPLAINED ¶ 101, at 3022 (1969).

9. Section 9-203(a) provides that when the security interest covers crops, oil, gas, minerals to be extracted, or timber to be cut, a description of the land concerned is also required.

10. UNIFORM COMMERCIAL CODE § 9-203, Comment 3.

11. *Id.* § 9-203(1).

12. *See Id.* § 9-302 and Comments. These types of personal property include: accounts, contract rights, general intangibles, inventory, equipment (other than farm equipment having a purchase price not in excess of $2500), chattel paper and documents of title. Section 9-302 thus requires public notice of the security interest on the automobiles involved in this case. *See also* O. SPIVAK, *supra* note 7, at 84.

13. *See* UNIFORM COMMERCIAL CODE § 9-302 and Comments.

indicating the types, or describing the items, of collateral.[14]

Thus, the Uniform Commercial Code requires a description of the collateral in both security agreements and financing statements. However, the required descriptions need not be painstakingly detailed.[15] Section 9-110 provides that "any description of personal property or real estate is sufficient, whether or not it is specific, if it reasonably identifies what is described."[16] This facilitates the description of items that are difficult to describe in detail and allows a blanket or general description for multiple items like inventory.[17] Section 9-110 has been construed as a rejection of certain pre-Code chattel mortgage cases[18] which had required exact and detailed descriptions of collateral,[19] even where there was undeniable proof of what was intended to be covered.[20] The Code has allowed courts to ignore these early cases and apply its less stringent standard.[21]

Most courts have held that greater particularity is required in the security agreement than in the financing statement,[22] based on their different functions: the security agreement is intended to minimize disputes concerning the terms of the agreement and the extent of the collateral;[23]

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14. *Id.* § 9-402(1). There is some question as to whether the same degree of specificity is required in the financing statement as in the security agreement. *See* text accompanying notes 22-24 *infra.*

15. 69 AM. JUR. 2D *Secured Transactions* § 292 (1973).

16. The Official Comment to § 9-110 states that the description is valid if it makes possible the identification of the thing described.

17. 69 AM. JUR. 2D *Secured Transactions* § 292 (1973). *See also* Security Tire & Rubber Co. v. Hlass, 246 Ark. 1113, 1117, 441 S.W.2d 91, 94 (1969); O. SPIVAK, *supra* note 7, at 27-28.

18. Perhaps prompted by the exacting description requirements of real property mortgages, these cases required the same in chattel mortgages. E.g., Master Loan Service, Inc. v. Maddox, 68 Ga. App. 429, 23 S.E.2d 179 (1942).

19. *See* UNIFORM COMMERCIAL CODE § 9-110 and Comment; 69 AM. JUR. 2D *Secured Transactions* § 292 (1973).

20. 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 2.7, at 53 (1965).

21. *Cf.* James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 23-3, at 789 (1972): "In our judgment, a minority of courts have been unduly illiberal and have required more 'description' than 9-203 and 9-110 contemplate." Furthermore, White and Summers cite *Laminated Veneers* as an "unduly illiberal" case. *Id.* at 789.

22. *See* J.K. Gill Co. v. Fireside Realty, Inc., 499 P.2d 813 (Ore. 1972); J. WHITE & R. SUMMERS, *supra* note 21, § 23-3, at 788; 1 P. COOGAN, W. HOGAN, D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 13.04[5], at 1360-61 (1973); 1 G. GILMORE, *supra* note 20, § 11.4, at 349 n.7; 4 R. ANDERSON, UNIFORM COMMERCIAL CODE § 9-110:4, at 118 (2d ed. 1971); H. BIRNBAUM, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 21.7, at 100 (1954). *Contra, In re* Thibodeau, 6 UCC REP. SERV. 873 (D. Me. 1969).

23. *See In re* Shelton, 472 F.2d 118 (8th Cir. 1973); *In re* Thibodeau, 6 UCC REP. SERV. 873 (D. Me. 1969); James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972); J.K. Gill Co. v. Fireside Realty, Inc., 499 P.2d 813 (Ore. 1972); 1 G. GILMORE, *supra* note 20, § 11.4, at 347; J. WHITE & R. SUMMERS, *supra* note 21, § 23-3, at 787-88; 1 P. COOGAN, W. HOGAN, D. VAGTS, *supra* note 22, § 13.04[5], at 1361; 4 R. ANDERSON, *supra* note 22, § 9-110:4, at 118.

the financing statement is designed merely to put third parties on notice of the secured party's claim.[24]

The court in *Laminated Veneers* held that the term "equipment" was an insufficient description of two automobiles for security agreement purposes.[25] Although conceding that the two automobiles would be included under the definition of "equipment" in 9-109(2),[26] the majority decided that the definitions of 9-109 are primarily for the purpose of determining filing requirements.[27] The court held that section 9-110 establishes the standard for purposes of describing collateral in the security agreement,[28] and that the generic term "equipment" did not reasonably identify the two automobiles.[29]

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24. *See* James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972); J.K. Gill Co. v. Fireside Realty, Inc., 499 P.2d 813 (Ore. 1972); J. WHITE & R. SUMMERS, *supra* note 21, § 23-3, at 787-88; 4 R. ANDERSON, *supra* note 22, § 9-114:4, at 118.

25. 471 F.2d at 1125.

26. Section 9-109 classifies "goods" in four categories—consumer goods, equipment, farm products, and inventory. These four categories are mutually exclusive. 1 G. GILMORE, *supra* note 20, § 12.3, at 371. As Comment 1 to § 9-109 points out, the classification is important in many situations, one of which is the determination of the place of filing. *See* Mitchell v. Shepherd Mall State Bank, 324 F. Supp. 1029 (W.D. Okla. 1971), *aff'd,* 458 F.2d 700 (10th Cir. 1972), where the court indicated in dictum that it is not among the purposes of the 9-109 classifications to describe or create the security interest. According to *Mitchell,* classification is not ordinarily a matter of intent of the parties (the identity of collateral in security agreements presumably is), but a question of law applied to the facts.

27. 471 F.2d at 1125. For example, whether a financing statement must be filed under § 9-302 to perfect the security interest, and where the statement must be filed under § 9-401.

28. *Id.*

29. 471 F.2d at 1125. *See* Mammoth Cave Prod. Credit Ass'n v. York, 429 S.W.2d 26 (Ky. 1968); *In re* Weiner's Men's Apparel, 2 BANKR. L. REP. ¶63,727 (S.D.N.Y. 1970), as examples of cases in which broad general descriptions have been held sufficient. In *Mammoth Cave* the collateral was described as "all farm equipment" and "all property similar to that listed above." The court said that these terms were so vague and indefinite that it was doubtful that they reasonably identified a tractor. In *Weiner* the court stated that the term "premises" did not encompass inventory and accounts receivable.

In re Lehner, 303 F. Supp. 317 (D. Colo. 1969), *aff'd,* 427 F.2d 357 (10th Cir. 1970), in which the term "consumer goods" was held to be an insufficient description of a tapedeck and a portable television in a financing statement. However, the Colorado version of UCC § 9-110 applied in *Lehner* differs from the official version of the UNIFORM COMMERCIAL CODE. COLO. REV. STAT. § 155-9-110 (1963) provides:

> For the purpose of this article, any description of personal property is sufficient *if it specifically identifies and itemizes in the security agreement what is described as to consumer goods,* and whether or not it is specific if it reasonably identifies what is described as to all other personal property.

(Emphasis added).

The drafters of the Colorado Code apparently intended to require greater

The court also said that a creditor examining the security agreement would conclude that the specifically-mentioned truck was the only vehicle intended to be covered.[30] The court seemed to be saying that because the secured creditor has specifically described some items of collateral, he must specifically describe all items of collateral of a like kind—even though the omnibus clause purported to cover "all equipment and fixtures belonging to the mortgagor, *whether herein enumerated or not* . . . ."[31] This reasoning is of questionable validity: pre-Code cases usually held that the enumeration of certain specific articles of collateral in a mortgage did not prevent other like articles from passing under a general description,[32] and post-Code cases appear to have followed this rule.[33]

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particularity. Still, the decision in *Lehner* was criticized in 48 DENVER L. J. 146 (1971).

The dissent in *Laminated Veneers* pointed out that many courts have accepted the use of generic descriptions in financing statements. 471 F.2d at 1127. *See In re* Carmichael Enterprises, Inc., 334 F. Supp. 94 (N.D. Ga. 1971), *aff'd*, 460 F.2d 1405 (5th Cir. 1972) (accounts receivable); *In re* Trumble, 5 UCC REP. SERV. 543 (W.D. Mich. 1968) (consumer goods); *In re* Bloomingdale Milling Co., 4 UCC REP. SERV. 256 (W.D. Mich. 1966) (equipment); Goodall Rubber Co. v. Mews Ready Mix Corp., 7 UCC REP. SERV. 1358 (Wis. Cir. Ct. 1970) (equipment); *but see* Mitchell v. Shepherd Mall State Bank, 324 F. Supp. 1029 (W.D. Okla. 1971), *aff'd*, 458 F.2d 700 (10th Cir. 1972); *In re* Bell, 6 UCC REP. SERV. 740 (D. Colo. 1969); Mammoth Cave Prod. Credit Ass'n v. York, 429 S.W.2d 26 (Ky. 1968).

The dissent also points out that several courts have allowed the use of § 9-109 descriptions in security agreements. 471 F.2d at 1127. *See, e.g.*, National Cash Register Co. v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963), where the court said that a description in a security agreement which described the collateral as all good-will, fixtures, equipment, and merchandise was sufficient to cover a cash register. In Security Bank & Trust Co. v. Blaze Oil Co., 463 P.2d 495 (Wyo. 1970), a listing in a security agreement of machinery, equipment, and parts was held to adequately describe nuts, bolts, gas tanks, communications radios, office furniture, typewriters, adding machines, and cash registers. In United States v. First Nat'l Bank, 470 F.2d 944 (8th Cir. 1973), the court said the description "all farm and other equipment" reasonably identified certain irrigation devices; United States v. Antenna Systems, Inc., 251 F. Supp. 1013 (D.N.H. 1966), upheld the description "all furniture, fixtures, and equipment." *See also In re* Fibre Glass Boat Corp., 324 F. Supp. 1054 (S.D. Fla. 1971), *aff'd mem.*, 448 F.2d 781 (5th Cir. 1971) (inventory); *In re* Goodfriend, 2 UCC REP. SERV. 160 (E.D. Pa. 1964) (inventory); Thomson v. O.M. Scott Credit Corp., 10 Ches. Sounty L. Rep. 405, 28 Pa. D. & C.2d 85 (C.P. 1962) (inventory).

30. 471 F.2d at 1125 (dictum).

31. *Id.* (emphasis added).

32. 69 AM. JUR. 2D *Secured Transactions* § 293 (1973).

33. *See* National Cash Register Co. v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963), in which a security agreement purported to cover all good-will, fixtures, equipment, and merchandise and gave a rather exhaustive list of examples of such equipment. Although there was no specific reference to a cash register, the Supreme Court of Massachusetts held that a cash register was covered by the agreement. In Security First Nat'l Bank v. Haden, 211 Cal. App. 2d 459, 27 Cal. Rptr. 282 (1962), a catchall clause covering all of the mortgagor's furniture, furnishings, fixtures, machinery, equipment, livestock, and personal property

A more potent indictment of the holding in *Laminated Veneers* is expressed in a strong dissent, pointing out that the majority failed to discuss one of the basic questions in the case—whether it was the intent of the parties, as expressed in the security agreement, that the secured creditor could look to the two automobiles as collateral for its loan.[34] The dissent considered the breadth of the omnibus clause in the security agreement to be indicative of an intent to include all the debtor's personal property, with the exception of stock in trade.[35] Such a broad security interest, attaching even to all the debtor's property, is clearly permissible under the Uniform Commercial Code.[36]

The best approach to the problem would begin by recognizing that the Code's requirements concerning descriptions of collateral in security agreements should be interpreted in light of the Code's general purposes—to enable commercial transactions to be conducted openly and with simplicity and certainty. The draftsmen, in section 9-110, wanted to avoid the strict requirements for descriptions of collateral that existed under pre-Code laws.[37] Thus, if the agreement contains information that will enable one to ascertain the collateral, it should be adequate, even if the collateral cannot be identified from the agreement alone.[38] The justification for this approach

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of every kind located on specified real property, and which also contained a clause listing specific equipment but providing that such listing should not limit the general description in the catchall clause, was a sufficient description of a nailing machine that was not specifically listed. *In re* JCM Cooperative, Inc., 8 UCC REP. SERV. 247 (W.D. Mich. 1970), the court expressly rejected the contention that there is any inconsistency between general and specific provisions; the specific provisions ordinarily qualify the meaning of the general provisions. *See also*, United States v. First Nat'l Bank, 470 F.2d 944 (8th Cir. 1973).

34. 471 F.2d at 1126. The financing statement, not the security agreement, gives notice to third parties. Thus, identifying collateral by inquiring into the intent of the parties regarding the latter cannot adversely affect them.

35. *Id.*

36. James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 287, 194 N.W.2d 775, 782 (1972); *see also In re* JCM Cooperative, Inc., 8 UCC REP. SERV. 247, 249 (W.D. Mich. 1970); 69 AM. JUR. 2D *Secured Transactions* § 292 (1973); O. SPIVAK, *supra* note 7, at 27-28.

37. *See* UNIFORM COMMERCIAL CODE § 9-110; *cf.* United States v. First Nat'l Bank, 470 F.2d 944 (8th Cir. 1973); *In re* Goodfriend, 2 UCC REP. SERV. 160 (E.D. Pa. 1964); James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972); Goodall Rubber Co. v. Mews Ready Mix Corp., 7 UCC REP. SERV. 1358 (Wis. Cir. Ct. 1970); 69 AM. JUR. 2D *Secured Transactions* §§ 292, 303 (1973); R. ANDERSON, *supra* note 22, § 9-110:3; H. BIRNBAUM, supra note 22, § 11.7; O. SPIVAK, *supra* note 7, at 26-27.

38. *See In re* Drane, 202 F. Supp. 221 (W.D. Ky. 1962); Security Tire & Rubber Co. v. Hlass, 246 Ark. 1113, 441 S.W.2d 91 (1969); O. SPIVAK, *supra* note 7, at 27.

Annot., 2 A.L.R.3d 839, 852 n.6 (1965) states:

> An additional argument favoring the acceptance of all-inclusive descriptions as sufficient under Uniform Commercial Code § 9-110 is the protection afforded under § 9-208, by which a debtor may demand that his creditor approve or correct a list of the collateral under a security agreement. If the secured party claims a security interest in all of a particular

is obvious. Detailed descriptions are virtually impossible in some transactions.[39] Further, allowing descriptions to be phrased in terms of 9-109 classifications[40] would best achieve commercial certainty. In not accepting such descriptions, *Laminated Veneers* departs significantly from not only the intent of the Code draftsmen, but also from the trend of the better reasoned decisions.

STEVEN C. PARRISH

LABOR LAW—UNION LIABILITY FOR WILDCAT STRIKES
Eazor Express, Inc. v. International Brotherhood of Teamsters[1]

On August 21, 1968, the members of defendant Local 249 honored and supported a picket line established at plaintiff's Pittsburgh terminal, and did not return to work until September 25, 1968. The strike was admittedly in violation of the "no-strike" provision of the supplements to the National Master Freight Agreement, to which plaintiff and defendant were parties.[2] Based on this breach, Eazor sought damages from the International and the Local in federal district court under section 301 of the Taft-Hartley Act.[3] Eazor alleged that the International had breached the labor contract

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type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral; but if less than all of a particular type of property was intended to be included within a description and the creditor fails to comply, the creditor is liable for any loss caused to the debtor thereby. As the comment to the section indicates, a third party, about to do business with a mortgagor, may utilize this section by demanding that the mortgagor produce an accepted and/or corrected list defining what is covered by the particular description used in the security instrument, or simply clarifying that, indeed "all" of the type of item specified is meant, thereby eliminating the basis for a third party's subsequent objection to an all-inclusive description.

39. 69 AM. JUR. 2D *Secured Transactions* §§ 292, 293 (1973); O. SPIVAK, *supra* note 7, at 28.

40. *See* note 26 *supra.*

1. 357 F. Supp. 158 (W.D. Pa. 1973).

2. 357 F. Supp. at 161. The no-strike provision of the National Master Freight Agreement provided:

> The Union[s] and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of [a] settlement, as provided for in this agreement [and in the National Agreement, if applicable] of any controversy which might arise.

3. Labor-Management Relations Act (Taft-Hartley Act) § 301, 29 U.S.C. § 185 (1970) provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose

by expressly authorizing the strike, or, alternatively, by not taking every reasonable means to end the strike.

The district court concluded that the International had not authorized, sanctioned, or given aid and comfort to the strikers, but found that the International was nonetheless liable for damages under the alternative allegation.[4] The court based its holding on the policy underlying federal labor legislation, which encourages settlement through arbitration, thus avoiding strikes.[5] The court reasoned that federal labor policy would be furthered by requiring the union to take every reasonable means to end a strike in violation of a no-strike clause.[6] The court also recognized that a chief advantage of collective bargaining agreements to employers is the assurance of uninterrupted operations during the term of the contract;[7] it is therefore reasonable to imply from the agreement a union obligation to take whatever reasonable measures are available to end activity engaged in by its members in which the union itself could not engage.[8]

An employer faced with a strike that violates a no-strike provision in a collective bargaining agreement, commonly designated a "wildcat" strike,[9] has two remedies against the union under section 301: (1) The employer

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activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

In Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court held that § 301 "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Id.* at 451. Section 301 gives federal district courts jurisdiction over employers's actions against unions for violation of a no-strike clause in a collective bargaining agreement. Signal-Stat Corp. v. Local 475, UEW, 235 F.2d 298 (2d Cir. 1956), *cert. denied,* 354 U.S. 911, *rehearing denied,* 355 U.S. 852 (1957). *See also* Yale & Towne Mfg. Co. v. Local 1717, International Ass'n of Machinists, 299 F.2d 882 (3d Cir. 1962). Granting jurisdiction to the federal courts under § 301 does not deprive state courts of jurisdiction in actions for breach of collective bargaining agreements. (Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)), but state courts must apply the federal substantive law to promote uniformity. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962).

4. 357 F. Supp. at 166-67.

5. *Id.* at 165.

6. *Id.*

7. *Id.* at 164, *quoting from* S. Rep. No. 105, 80th Cong., 1st Sess., p. 16 (1947).

8. 357 F. Supp. at 164.

9. Spelfogel, *Wildcat Strikes and Minority Concerted Activity-Discipline, Damage Suits and Injunctions,* 24 LAB. L.J. 592, 593 n.2 (1973):

> A "wildcat strike" is defined in ROBERT'S DICTIONARY OF INDUSTRIAL RELATIONS 460 (1966) as a work stoppage generally spontaneous in character by a group of union employees without union authorization or approval. It is frequently called by a group of employees because of minor problems such as the disciplining of a union member, or may exist where a local supports a strike but has not received approval of the national or international union. A "wildcat strike" generally, according to Roberts, is in violation of (an) applicable agreement.

may sue for damages from the union;[10] or (2) the employer may seek to enjoin the strike.[11] These remedies are not available, however, unless the employer shows that the union is responsible for the strike under a no-strike provision in the labor agreement.[12] The federal courts differ in their view of the union's responsibilities under the no-strike clause.

Two courts have held that the union is liable under section 301 only if it actively supports the wildcat strike.[13] Thus, where the union did not authorize the strike, and advised the strikers to return to work, the court, finding the union not liable, said, "The question is not whether they [the union agents] did everything they might have done [to end the strike], but whether they adopted, encouraged or prolonged the continuance of the strike."[14] This narrow concept of union responsibility has been justified on the ground that the union may not have the loyalty of all its members and hence to hold the unon responsible for an unauthorized strike would be unfair.[15]

Unions have resisted increased responsibility for "wildcat" strikes by arguing that it is an unfair labor practice to restrain or coerce employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining.[16] A wildcat strike, however, is not a concerted activity protected under section 7 of the National Labor Relations Act.[17]

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10. Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962). The court held that § 301 expressly authorized the awarding of money damages against a union.

11. Boys Markets, Inc. v. Local 770, Retail Clerks Union, 398 U.S. 235 (1970).

12. 24 LAB. L.J. 593 (1973). For a discussion of employees's liability under a collective bargain agreement see Holtmann, *Employees' Liability Under Section 301 of Taft-Hartley Act*, 38 Mo. L. REV. 128 (1973).

13. United Constr. Workers v. Haislip Baking Co., 223 F.2d 872 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955); Garmeada Coal Co. v. International Union, UMW, 122 F. Supp. 512 (E.D. Ky. 1954), *aff'd*, 230 F.2d 945 (6th Cir. 1956).

14. United Constr. Workers v. Haislip Baking Co., 223 F.2d 872, 877-78 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955).

15. Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672, 710 (1967).

16. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 158(a)(3) of this title.

National Labor Relations Act § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970), provides:

> It shall be an unfair labor practice for a labor organization or its agents —(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in § 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

17. Atkinson v. Sinclair Refining Co., 370 U.S. 238, 246 (1962); International Union UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245, 257 (1949).

The Fourth Circuit so held in *NLRB v. Draper Corp.*,[18] and Congress approved *Draper* in the Taft-Hartley Amendments.[19] The Supreme Court subsequently accepted *Draper*[20] and the N.L.R.B. has consistently followed that decision.[21]

Like *Eazor*, two other cases have rejected the reasoning behind this narrow concept of union responsibility.[22] In *Adley Express Co. v. Local 107, Highway Truck Drivers and Haulers*[23] the court said the "mere failure to take substantial steps to get the membership back to work can constitute sufficient union involvement in the illegal strike to sustain its liability."[24] Similarly, *Vulcan Materials Co. v. United Steelworkers*[25] held that even though the union's representative may have advised the employees to return to work, he failed to take action which could reasonably have been expected to effectuate that end and thus could be said to have acquiesced in and condoned the illegal activity.[26]

Eazor, *Adley*, and *Vulcan* evidence a trend toward broader union responsibility for the acts of its members.[27] Broad union responsibility does not place an undue burden on the union because it has the power to impose sanctions against union members who fail to comply with the collective bargaining agreement.[28] The Supreme Court has held that unions have the right to discipline, by fine or suspension of union benefits and privileges,

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18. 145 F.2d 199 (4th Cir. 1944). *See also* Plasti-Line, Inc. v. NLRB, 278 F.2d 482, 486 (6th Cir. 1960), where the court said:

> [W]e . . . conclude the walkout (a wildcat strike) here was contrary to the spirit and letter of the National Labor Relations Act and not one entitled to protection as being "concerted activities for the purpose of collective bargaining or other mutual aid or protection" under § 7 (29 U.S.C.A. § 157) of the Act.

19. H.R. Rep. No. 245, 80th Cong., 1st Sess. 27 (1947). That wildcat strikes were not considered a "protected activity" is clearly shown by Senator Taft's (a sponsor of §§ 8 (b)(1)(A) & 301) express recognition that wildcat strikers could be subjected to fines imposed by the union.

20. Cases cited note 17 *supra*.

21. *See* Stop & Shop, Inc., 161 N.L.R.B. 5 (1967).

22. Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971); Adley Express Co. v. Local 107, Highway Truck Drivers & Helpers, 349 F. Supp. 436, 444 (E.D. Pa. 1972).

23. 349 F. Supp. 436 (E.D. Pa. 1972).

24. *Id.* at 444.

25. 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).

26. *Id.*

27. Labor-Management Relations Act (Taft-Hartley Act) § 301(e), 29 U.S.C. § 185(e) (1970), provides:

> For the purposes of this section, in determining whether a person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The National Labor Relations Act (Wagner Act) § 2(13), 29 U.S.C. § 152(13) (1970), contains a similar provision.

28. Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions*, 24 LAB. L.J. 592, 610-11 (1973).

members who cross picket lines or violate union rules.[29] Although this recognition of the union's right to use coercive methods involved a situation in which the exercise of the power directly benefited the union, the right to use similar measures against wildcat strikers to avoid a breach of a no-strike provision in a collective bargaining agreement would seem to be equally valid.

Eazor requires unions to take reasonable steps to end strikes in violation of a no-strike clause. The collective bargaining agreement the union has signed should require no less. It seems probable that this requirement will not place unions in an untenable position because the limitation of "reasonableness" makes the union's duty correlative to its power and influence over its membership. *Eazor* provides a logical and just standard for determining union liability in section 301 actions.

ROBERT E. COWHERD

CONSUMER PROTECTION—MERCHANDISING PRACTICES ACT—FRAUDULENT AND DECEPTIVE TRADE PRACTICES ENJOINED

State ex rel. Danforth v. Independence Dodge, Inc.[1]

I. THE MISSOURI STATUTE APPLIED

The cause of the consumer was advanced another step in Missouri in April, 1973, by judicial recognition and approval of the new cause of action provided in the Merchandising Practices Act.[2] In the first decision of record under the Act, *State ex rel. Danforth v. Independence Dodge, Inc.*, the Kansas City District of the Missouri Court of Appeals upheld the issuance of an injunction against the defendant automobile dealer for certain deceptive and fraudulent practices.

The proceeding by the attorney general alleged violations of the Merchandising Practices Act based on three separate transactions with customers and a charge of general odometer tampering.[3] In the first transaction David E. Cox visited defendant's place of business and was shown a 1969 Dodge Monaco. The car was represented as new except for 3000 miles driven by defendant's general manager. Relying on these assurances, Cox bought the car, but within a short time problems developed with the car's radiator, air conditioner, speedometer, left door, transmisson, and suspension. Through investigation Cox learned that the automobile had

29. Scofield v. NLRB, 394 U.S. 423 (1969); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, *rehearing denied*, 389 U.S. 892 (1967).

1. 494 S.W.2d 362 (Mo. App., D.K.C. 1973).

2. Ch. 407, RSMo 1969. Since the date of decision the Act has been revised and supplemented in §§ 407.010-.130, RSMo 1974 Supp. Details of the new legislation are discussed in part III of this casenote.

3. Altering or resetting the odometer of a motor vehicle with intent to defraud has since been made an unlawful practice by statute, §§ 407.510-.555, RSMo 1974 Supp. Section 407.545 allows the purchaser of an illegally altered vehicle to maintain a civil action against the violator, with possible recovery of treble damages or $1500, whichever is greater, plus costs and reasonable attorney's fees. Section 407.555 makes the violation of the statute a misdemeanor.

previously been leased to Avis Rental Company and had been wrecked, and that defendant's used car manager had purchased the car at an automobile auction the day before its sale to him.[4]

The second incident involved a 1970 Dodge Coronet, which defendant's salesmen represented to Mrs. Mary Edith LaHue as a demonstrator, "just as good as new." Accepting their assurances and being promised that the car would be undercoated, Mrs. LaHue made the purchase. Subsequently, Mrs. LaHue complained several times about the car, and certain minor problems were corrected. Some major problems persisted: the car "wouldn't track," shimmied at highway speeds, and the accelerator, air conditioner, and fan did not work properly. At trial a former salesman for defendant testified that before its sale to Mrs. LaHue, the car had been given to him for use as a demonstrator, but it had performed so poorly it was unfit for that purpose; and he demanded another. He also testified that defendant's sales manager told him to have Mrs. LaHue bring the car in for an inspection because "the car had been wrecked and he didn't want anything to happen to the deal." When reminded that no undercoating had been done as promised, the sales manager responded, "Let it go," because "she would probably never know the difference anyway."[5]

Richard Phelps was interested in a low mileage car with some factory warranty remaining and was aware of defendant's advertisement of Chrysler Corporation's 50,000 mile or five-year warranty. Defendant's salesmen showed him a Dodge Coronet with 31,000 miles indicated on the odometer. Relying on their assurances that the reading was correct, Phelps bought the automobile. About a month after the purchase the car failed to pass the state vehicle inspection because of excessive steering play and a defective idler arm. In addition, the car suffered from overheating, water leaks, and defective windows, door locks, and brakes, and was generally unsafe to drive. The former owner testified at trial that he drove the car from 1968 to 1970 and traded it with about 50,000 miles registered. The "inescapable inference" was that the odometer had been turned back substantially between the trade-in and resale to Phelps.[6]

On these facts as found by the trial court, the appellate court held that the injunction was appropriate, but agreed with the defendant that the injunction imposed an overbroad prohibition. The decree was modified accordingly, so that only specific practices defendant committed in the past were enjoined.[7]

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4. 494 S.W.2d at 367-68.
5. *Id.* at 369.
6. *Id.* at 369-70.
7. *Id.* at 371. *See* Commission Row Club v. Lambert, 161 S.W.2d 732 (St. L. Mo. App. 1942). Defendant also contended that because of the reference in § 407.100, RSMo 1969 (which specifies that three-days notice be given to the offender in advance of filing an injunction suit), to the notice provisions in § 407.040, RSMo 1969 (which authorizes the Civil Investigative Demand), the legislature intended to require the Demand procedure as a jurisdictional prerequisite to the filing of suit. The court rejected that reasoning, finding no such express requirement in § 407.100, RSMo 1969, or in the Federal Antitrust Process

The court of appeals first observed that in each of the preceding transactions the injured buyers could probably have recovered against the defendant in a common law action for fraud. In the Cox sale defendant's manager knew the extent of damage done to the car; as a knowledgeable misrepresentation or omission of a material fact, his participation in the sale was clearly fraudulent.[8] The court reasoned that even if the salesmen were not fully aware of the condition of the car, they still acted fraudulently by making affirmative statements which were in fact false while conscious of their lack of knowledge of the truth or falsity thereof.[9] Similar omissions and misrepresentations of material facts to Mrs. LaHue also constitute fraud, whether due to deliberate misstatement or conspicuous lack of knowledge.[10] And alterations of odometer readings and misrepresentations thereof have been held fraudulent in Missouri.[11]

Despite the availability to the injured parties of private legal remedies, the court rejected defendant's contention that issuance of an injunction was therefore improper. The purpose of the Merchandising Practices Act and related legislation, the court said, was to create a public right of action to supplement private actions which had proven largely ineffective because of excessive financial burdens, unavoidable contractual limitations, and an increasingly impersonal market place. To fill the void the legislature had adopted this new remedy, with injunctive relief sought by a public official, as the chief weapon to protect consumers' interests.[12]

II. Common Law and Federal Remedies

Only after examining the few earlier modes of relief from which victimized consumers could choose can one appreciate the importance of the new statutory rights of action now available in Missouri and other states.[13] As the court suggests, the common law action of fraud has been the main-

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Act, 15 U.S.C. § 1312 (1970), after which the procedure is patterned. The Demand procedure is another pretrial discovery tool available to the attorney general which he can exercise at will, but no consequences follow from its non-use. 494 S.W.2d at 366. *See* Annot., 10 A.L.R. Fed. 677 (1972).

8. Bowers v. S-H-S Motor Sales Corp., 481 S.W.2d 584 (Mo. App., D.K.C. 1972); *accord*, Miller v. Higgins, 452 S.W.2d 121 (Mo. 1970).

9. Ackmann v. Keeney-Toelle Real Estate Co., 401 S.W.2d 483 (Mo. En Banc 1966).

10. Ackmann v. Keeney-Toelle Real Estate Co., 401 S.W.2d 483 (Mo. En Banc 1966); Beshears v. S-H-S Motor Sales Corp., 433 S.W.2d 66 (K.C. Mo. App. 1968); Wilson v. Murch, 354 S.W.2d 332 (St. L. Mo. App. 1962).

11. Williams v. Miller Pontiac Co., 409 S.W.2d 275 (K.C. Mo. App. 1966); Jones v. West Side Buick Co., 231 Mo. App. 187, 93 S.W.2d 1083 (St. L. Ct. App. 1936). *Compare* §§ 407.510-.555, RSMo 1974 Supp., discussed note 3 *supra*.

12. 494 S.W.2d at 370. *See* Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724 (1972), cited by the court, for a more thorough history of the development of new consumer remedies; *see also* Halliburton, *The Uniform Consumer Sales Practices Act—Some Consumer Progress*, 29 J. Mo. B. 235 (1973), for a discussion of some of the shortcomings of consumer remedies, both public and private, in Missouri.

13. At least 42 states have adopted legislation similar in scope to the Merchandising Practices Act. Generally, the various statutory plans can be separated into three categories. First, the so-called "little FTC acts" prohibit unfair

stay of aggrieved customers. Not all complainants have found satisfaction quite so easily attainable as the three purchasers named in *Independence Dodge* might have found it.[14] Considerable burdens accompany proof of fraud; it is never presumed, but must be established from the evidence;[15] and the burden rests on the one asserting it to do so.[16] Missouri courts have defined nine separate elements of the offense,[17] each of which involves a question of fact and must be proved.[18]

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or deceptive acts or practices in commerce and empower state agencies to issue cease-and-desist orders or seek injunctions against violative practices. Second, the Deceptive Trade Practices Acts make illegal certain types of practices involving misleading trade identifications or deceptive advertising which are likely to create unfair methods of competition and harm the general business community as well as consumers. Third are the consumer protection acts, to which Missouri's statute is most closely related and which include the UNIFORM CONSUMER SALES PRACTICES ACT, which are often phrased in very broad language and have the primary goal of prohibiting practices that pose the greatest threat to consumer interests. 1 CCH Pov. L. REP. ¶3200 (1972); Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1972); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 349 (1972).

14. The three purchasers were not parties in *Independence Dodge* and the attorney general did not request restitution for them. Each of the three did recover his losses from the dealer later, two by settlement and one by a private action subsequent to this decision. Interview, Harold Lowenstein, Assistant Attorney General, in Jefferson City, Mo., Feb. 5, 1974.

15. Hardwicke v. Hamilton, 121 Mo. 465, 26 S.W. 342 (1894).

16. Lowther v. Hayes, 225 S.W.2d 708 (Mo. 1950).

17. Yerington v. Riss, 374 S.W.2d 52 (Mo. 1964); Powers v. Shore, 248 S.W.2d 1 (Mo. En Banc 1952); Williams v. Miller Pontiac Co., 409 S.W.2d 275 (K.C. Mo. App. 1966). Those elements are: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, (9) and his consequent and proximate injury.

18. Yerington v. Riss, 374 S.W.2d 52 (Mo. 1964); Cohen v. Metropolitan Life Ins. Co., 444 S.W.2d 498 (St. L. Mo. App. 1969); Burns v. Vesto Co., 295 S.W.2d 576 (K.C. Mo. App. 1956); Hanson v. Acceptance Fin. Co., 270 S.W.2d 143 (K.C. Mo. App. 1954); 37 AM. JUR. 2D *Fraud & Deceit* § 12 (1968). In finding for defendant in *Yerington* the court cited what it referred to as the general rule in Missouri that fraud must relate to representations of present or pre-existing facts, and cannot be predicated on representations of matters or things to be done in the future. The court in *Cohen* denied the insurance company's defense of fraud to a claim under a policy where it appeared that the policy holder had not read the application completely and therefore did not knowingly give false answers. In *Burns* the court noted that whether there was intentional fraud or honest mistake was a fact question for the jury. But the plaintiff in *Hanson* was denied relief on his claim of fraudulent extraction of interest, the court holding that complainant must exercise reasonable diligence to learn the true facts when the means of discovery are readily available. *But see* Throckmorton v. M.F.A. Cent. Cooperative, 462 S.W.2d 138 (St. L. Mo. App. 1970), in which plaintiff recovered on his claim for fraudulent misrepresentation of the quality of ground hog feed even though he had 27 years experience raising hogs and had noticed the general physical condition of the feed. The court emphasized that past successful dealings with the seller inspired trust and gave plaintiff the right to rely on his statements.

If an action for fraud was not maintainable an injured consumer was often left without a remedy, and until recently had little hope for protection against similar injuries or losses in the future. An early statutory development that provided the basis for protection of consumer interests in later years was the Federal Trade Commission Act of 1914.[19] In the twenty years following its enactment the FTC was all but incapable of coming to the aid of individual consumers who had been wronged because the Act required proof of an actual injury to competition. The Wheeler-Lea amendment in 1938 enlarged the jurisdiction of the FTC to include "unfair or deceptive acts or practices in commerce," as well as unfair methods of competition.[20] The immediate results were not overwhelming. Final orders were often slow in coming and actual enforcement even more protracted.[21] The FTC could not officially seek compensation for victims of deceptive practices, and the statute did not provide for private causes of action.[22] Recent years have witnessed a gradual expansion of the agency's powers, with the FTC fashioning broader orders to meet the needs of unusual circumstances, occasionally without specific statutory authorization.[23] Thus far, courts have given the FTC wide latitude in drawing its orders, striking down only those found unnecessarily broad. These expanded powers have been called analogous to those of a court of equity.[24]

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19. 15 U.S.C. § 41 (1970).

20. 15 U.S.C. § 45(a)(1) (1970).

21. The classic case is *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir.), *cert. denied*, 381 U.S. 924 (1965), in which thirty years passed between issuance of the first FTC consent order, 24 FTC 1413 (1936), and final adjudication; the company was assessed a $100,000 fine for contempt of court after continuing the prohibited practice for years in its multi-million dollar business.

22. It has been posited that the mechanism already exists to create a private, federal cause of action under statutes like the FTC Act. Lovett, *Private Actions for Deceptive Trade Practices*, 23 AD. L. REV. 271 (1971). Lovett thinks it possible to develop the private remedy through tort law, based on RESTATEMENT (SECOND) OF TORTS §§ 285-88 (1965). Section 286 lists circumstances under which a court may imply tort liability from legislation aimed at the injury-causing activity. One such private action in tort has been accepted in cases involving violation of federal securities law. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). The Supreme Court ruled there was no implied right of action under the FTC Act before the Wheeler-Lea amendment in 1938, FTC v. Klesner, 280 U.S. 19 (1929); Moore v. New York Cotton Exch., 270 U.S. 593 (1926), and has not considered the question since. For a collection of lower court decisions, which are split on the question see Lovett, *supra*, at 277-78. *See also* Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U.M.K.C.L. REV. 292 (1972), for a general discussion of the doctrine of implication in Missouri.

23. For example, the FTC has recently ordered refunds and exchanges for victims of deceptive practices. Publisher Continental Sales Corp., 3 Trade Reg. Rep. ¶19,856 (FTC 971). In Arthur Murray Studio, Inc. v. FTC, 458 F.2d 622 (5th Cir. 1972), the court upheld an order placing a monetary limitation on contracts between customers and the studio and requiring the studio to give customers a seven-day cooling off period in which to cancel contracts. *See* Note, *Consumer Protection—Remedies of the Federal Trade Commission—Expansion to Include Limitations on Contracts*, 47 TUL. L. REV. 436 (1973), for a summary of the development of the agency's powers.

24. Note, *supra* note 23.

Other significant legislation passed in the same historical context as the amended Federal Trade Commission Act are the Securities Act of 1933[25] and the Securities Exchange Act of 1934.[26] Although not specifically designed to regulate consumer transactions in the ordinary sense, these Acts did serve as precedents for the Truth-in-Lending Act.[27] Truth-in-Lending, although protecting in general the same interests as the FTC Act, differs in at least one important respect: it provides for private civil actions in federal court for violation of certain disclosure requirements.[28] Missouri has enacted complementary legislation in its new Retail Credit Sales Act,[29] but it does not specifically authorize private actions.

Amendment of the federal class action rule[30] in 1966 raised the possibility that groups of consumers injured by the same or very similar deceptive and unlawful trade practices would have a practical, effective mode of redress en masse where individual damages were too small to pursue separately. The Supreme Court apparently foreclosed that possibility in *Snyder v. Harris*,[31] which held that small claimants cannot aggregate their damages to satisfy the federal jurisdictional amount of $10,000 if the cause of action alleged on behalf of the class is not "joint and common" to the whole class, but "separate and distinct." The validity of *Snyder* was reaffirmed in 1973 when the Court held that all plaintiffs, unnamed as well as named, must meet the jurisdictional amount in order to maintain a class action.[32]

It has been suggested[33] that consumers might still maintain a class action in federal court by bringing a claim under a federal statute granting federal jurisdiction without the requisite monetary amount. Success under that theory has been limited, however, and it appears that courts are moving even farther away from recognizing a "small claims" purpose in the class

25. 15 U.S.C. § 77a (1970).
26. 15 U.S.C. § 78 (1970).
27. Title I of the Consumer Credit Protection Act of 1968, 15 U.S.C. §§ 1601-65 (1970).
28. Section 1640 allows recovery of "twice the amount of the finance charge . . . [but in no case] less than $100 nor greater than $1000," plus costs of litigation and reasonable attorney's fees. The action must be brought within one year of the date of violation.
29. §§ 408.250-.370, RSMo 1974 Supp. The statute details the form and contents of time contracts (§ 408.260); places limitations on the rates of time charges (§ 408.300); and states the consequences of its violation (§ 408.370); (1) violation is a misdemeanor; (2) violator is barred from recovery of time charges and delinquency or collection charges; and (3) seller can correct noncompliance within 10 days after notice by buyer.
30. FED. R. CIV. P. 23.
31. 394 U.S. 332 (1969).
32. Zahn v. International Paper Co., 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973).
33. Comment, *Consumer Class Actions Under Federal Rule 23: Consumer Protection Causes of Action Available Under Federal Statutes*, 25 S.C.L. REV. 240 (1973).

action procedure.[34] If consumers are to be able to redress their grievances as a class in federal courts with a reasonable expectation of success, it is almost certain that legislative action will be required.[35]

III. Current Missouri Statutory Remedies

The Merchandising Practices Act[36] and similar legislation in other states[37] has provided a much needed remedy for consumers injured in the market place.[38] The statute's major departure from the common law is in

34. The leading case brought as a class action under the Truth-in-Lending Act (*see* notes 27 and 28 *supra*) is Ratner v. Chemical Bank Trust Co., 54 F.R.D.—(S.D.N.Y. 1972), in which it was alleged that defendant failed to state the "annual percentage rate" on its "Master-Charge Credit Card Plan." Up to $13,000,000 was involved and up to 130,000 people were in the class. The court held the case not maintainable as a class action under Federal Rule 23(b)(3), because it failed the test of "superiority": the individual remedies, providing for fines, costs, and attorney's fees eliminate the affirmative need for a class action. The court said allowing a class action in such a situation could produce "horrendous" results. *Id.* at 416.

Another case with implications perhaps even more damaging to consumers is Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), *cert. granted*, 42 U.S.L.W. 3212 (U.S. Oct. 16, 1973). The court upheld the applicability of the class action procedure in this antitrust suit brought on behalf of 3,700,000 investors alleging conspiracy to fix commissions on securities transactions. Eisen v. Carlisle & Jacqueline, 391 F.2d 555 (2d Cir. 1968). But in 1973 the court dismissed the action because the representatives refused to pay costs of actual notice to 2,250,000 class members whose names and addresses were known. 479 F.2d 1005 (2d Cir. 1973).

35. Three consumer class action bills have been introduced into the Senate but none has been acted on. S. 984, 92d Cong., 1st Sess. (1971); S. 1378, 92d Cong., 1st Sess. (1971); S. 1222, 92d Cong., 1st Sess, (1971). The bills were sponsored by Sen. Magnuson, Sen. Bayh, and the Nixon administration, respectively.

36. Although the Merchandising Practices Act includes all of Ch. 407, RSMo 1974 Supp., only §§ 407.010-.130 are the subject of this casenote. Other sections of interest provide for the treatment of unsolicited merchandise, § 407.200; alteration of motor vehicle odometers, §§ 407.510-.555 (*see* note 3 *supra*); and home solicitation sales, §§ 407.700-720. The last section provides for a three-day "cooling-off" period during which a purchaser may cancel a credit sale of goods or services made to him in his home.

Another recent enactment is the Cancellation of Automobile Insurance Policies Act, §§ 379.110-.203, RSMo 1974 Supp. The act permits only two grounds for cancellation of a policy, nonpayment of premiums and suspension of the insured's driver's license, and forbids refusal of coverage to anyone with at least two years driving experience solely because of age, residence, race, sex, color, creed, national origin, ancestry, lawful occupation, or cancellation or refusal by another insurer. Cancellation or refusal to insure must be accompanied by a written explanation of the specific reasons for the decision.

37. *See* Lovett, *supra* note 13.

38. Although the Uniform Commercial Code places an implied warranty of merchantability and fitness on every sale of goods, §§ 400.2-314, .2-315, RSMo 1969, it is at best an imperfect remedy. By its own terms the warranty applies to the sale of goods and appears not to extend to services or consumer leases. That disability may not be absolute, however. Section 2-313, comment 2, states that the

eliminating many of the strict requirements of an action for fraud.[39] In their place a rather broad definition[40] of unlawful practices is stated, leaving the courts free to decide whether the state's policy of preserving "fundamental honesty, fair play and right dealings in public transactions"[41] has been subverted in particular cases.

As originally enacted, the Office of the Attorney General enforced the Act through its newly-created Consumer Protection Division.[42] Private

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warranty sections were not designed to "disturb those lines of case law growth which have recognized that warranties need not be confined . . . to sales contracts . . . ." A few courts have applied the implied warranty of fitness to non-sale transactions. *See, e.g.*, Citrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965) (leasing of chattels); Newmark v. Gimbel's Inc., 102 N.J. 279, 246A.2d 11 (Super. Ct. App. Div. 1968) (beauty parlor treatments).

The implied warranty can be disclaimed by the seller if done in a conspicuous writing which mentions the word "merchantability," UNIFORM COMMERCIAL CODE § 2-316 (§ 400.2-316, RSMo 1969). The disclaimer is effective if the purchaser is adequately appraised of the disclaimer and it is effectively incorporated into the sale. *But see* Rehurek v. Chrysler Credit Corp., 262 So. 2d 452 (Fla. App. 1972), for an example of judicial reluctance to let the seller escape so easily.

The consumer must also contend with UNIFORM COMMERCIAL CODE § 2-719 (§ 400.2-719, RSMo 1969), which allows a limitation of remedies available to a purchaser, such as limiting seller's obligation to repairing or replacing defective parts or goods and limiting liability for consequential damages. But the section deems a limitation on liability for consequential damages for personal injury from consumer goods prima facie unconscionable, and if the seller does not prove otherwise the consumer may use all remedies available under the Code. Matthews v. Ford Motor Co., 479 F.2d 399 (4th Cir. 1972), applying Virginia law. When the damage is only commercial, however, the purchaser must show that the exclusive or limited remedy failed in its essential purpose (§ 2-719(2)), in order to have access to other remedies under the Code. Courts are by no means consistent in their interpretation of when a limited remedy "fails in its essential purpose." *Compare* Lankford v. Rogers Ford Sales, 478 S.W.2d 248 (Tex. Civ. App. 1972), *with* Moore v. Howard Pontiac-American, Inc., 492 S.W.2d 227 (Tenn. App. 1972). *See* Comment, *Providing Consumer Relief from Disclaimers*, 22 DEPAUL L. REV. 794 (1973), concluding that the consumer's present status under the UNIFORM COMMERCIAL CODE is highly uncertain.

39. *See* notes 17, 18 and accompanying text *supra*.

40. § 407.020, RSMo 1974 Supp., provides:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, is declared to be an unlawful practice . . . .

The version under which the decision in *Independence Dodge* was rendered is substantially the same.

Though the statute requires a misrepresentation or concealment of a material fact with the intent that others rely thereon, the injured party no longer has to establish his right to rely on the statements made to him as in a common law fraud action. Also, as in the Cox transaction in *Independence Dodge*, the speaker need only be aware of his lack of knowledge of the truth or falsity of his statement. Ackmann v. Keeney-Toelle Real Estate Co., 401 S.W.2d 483 (Mo. En Banc 1966).

41. 494 S.W.2d 362, (Mo. App., D.K.C. 1973).

42. The division has been in operation since Oct. 13, 1967, the effective date of the Act.

actions under the statute were not specifically authorized until its revision in 1973.[43] The division has essentially three ways to correct violations. First, the offender may be notified informally that complaints have been made and that he is in violation of the statute. In most instances a conscientious businessman will mend his practices and no more official action will be required.[44] Second, if the offenses have been of such a nature that an official record is desired, the division may accept a written assurance of voluntary compliance, which will be filed in the appropriate circuit court.[45] Third, where a pattern of unlawful acts or practices can be establishd an injunction may be sought in circuit court prohibiting such practices in the future.[46] In investigating an alleged violation of the statute the division may serve on any person believed to have relevant information, documentary material, or physical evidence a civil investigative demand "requiring such person to appear and testify, or to produce relevant documentary material or physical evidence for examination . . . ."[47]

The court is given a substantial amount of latitude in fashioning a decree once it finds that the defendant engaged in unlawful acts or practices. In addition to granting the injunction, it may make such other orders as necessary to prevent the recurrence of the practices and to restore money or property to anyone who suffered an ascertainable loss by reason of the prohibited practice.[48]

Perhaps the most significant change in the Act in the 1973 revision[49] is the addition of a new section providing for a private cause of action.[50]

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43. *See* note 50 and accompanying text *infra*.

44. Interview with Harvey Tettlebaum, Chief Counsel, Consumer Protection Division, in Columbia, Mo., Jan. 18, 1974.

45. § 407.030, RSMo 1974 Supp: "[S]uch assurance of voluntary compliance shall not be considered an admission of violation for any purpose."

46. § 407.100, RSMo 1974 Supp. Notice of impending suit must be given the violator at least three days prior to institution of the action in accordance with § 407.040, RSMo 1974 Supp.

47. § 407.040, RSMo 1974 Supp.

48. § 407.100, RSMo 1974 Supp. The 1973 revision of the Act gave the court explicit power, when necessary, to appoint a receiver to take possession of the assets, records, and other property of the violator. Section 407.105 sets out the duties of the receiver, and entitles persons injured by unlawful acts to participate with the general creditors in the distribution of assets to the extent of out-of-pocket losses. It is presumed that this procedure will be used only in unusual instances in which the offending merchant attempts to remove his assets from the state.

49. H.R. 55, 77th Gen. Assembly, 1st Reg. Sess. (1973).

50. § 407.025.1, RSMo 1947 Supp., provides:

> Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action . . . to recover actual damages. . . .

The burden of proof is lessened by subsection (8), which provides:

> Any permanent injunction, judgment or order of the court made under section 407.100 shall be prima facie evidence in an action brought under this section that the respondent used or employed a method, act or practice declared unlawful by section 407.020.

The consumer may recover actual damages, and the court may, in its discretion, award punitive damages, reasonable attorney's fees, and provide such equitable relief as is necessary.[51]

Authorization of private remedies for consumers is a step long awaited by critics of Missouri's consumer protection program.[52] Still, costs of litigation and risks of defeat may be so great as to minimize the benefits of the possible recovery.[53] True, Missouri's scheme permits an award of punitive damages and attorney's fees, but there is a common law tradition against freely awarding punitive damages.[54] Yet, there are fraud cases in Missouri in which generous punitive damage awards have been upheld.[55]

The second major feature of section 407.025 is the provision for a class action for persons entitled to bring a private action.[56] The rules governing this class action correspond generally with Missouri Supreme Court Rule 52.08 and Federal Rule of Civil Procedure 23, with one very important difference: Where the class action is maintained because of the predominance of questions of law or fact common to members of the entire class, only those members who are notified and request inclusion will be bound by the judgment.[57] In this respect, the plan is an "opt-in" instead of "opt-out" procedure.

It is too early to predict how Missouri consumers will benefit from the opportunity to maintain class actions. The plan's chief advantage would seem to lie in the "small claims" area with repeated similar deceptive transactions.[58] One would expect that as claims grow larger, the uniqueness of the separate claims would begin to overshadow the questions common to the class.

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51. *Id.*

52. *See, e.g.*, Gamm, *Regulation of Business Practices for Consumer Protection*, 28 J. Mo. B. 438 (1972); Halliburton, *supra* note 12.

53. *See* W. PROSSER, LAW OF TORTS 9-11 (3d ed. 1964).

55. The standard in Missouri for punitive damages in cases of fraud and deceit is usually stated to be those instances in which legal malice is present. One need show only that a wrongful act was intentionally done without just cause or excuse; it is not necessary to show spite, ill will or wantonness. Beshears v. S-H-S Motor Sales Corp., 433 S.W.2d 66 (K.C. Mo. App. 1968); Universal C.I.T. Credit Corp. v. Tatro, 416 S.W.2d 696 (K.C. Mo. App. 1967). On facts remarkably similar to those in *Independence Dodge*, the court in Bowers v. S-H-S Motor Sales Corp., 481 S.W.2d 584 (Mo. App., D.K.C. 1972), upheld a judgment of $250 actual damages and $10,000 punitive damages.

56. § 407.025.2-.6, RSMo 1974 Supp.

57. § 407.025.4(2)(b), RSMo 1974 Supp. The plan would thus appear to sidestep Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), *cert. granted*, 42 U.S.L.W. 3212 (U.S. Oct. 16, 1973) discussed note 34 *supra*, requiring notice to all known class members, because no one is bound by the judgment unless they "opt in." *See* Fisch, *Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action*, 38 Mo. L. REV. 173 (1973).

58. Lovett, *supra*, note 22. In Eovaldi & Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 NW. L. REV. 281 (1971), the position is advanced that a class action works best when injunctive relief, rather than damages, is sought. The authors see a loss of the requisite community of interest where the amount of damages claimed varies among members of the class. If that proposition is accurate, might not the action be better left to the administrative body empowered to seek injunctions for the benefit of the people of the state?

A secondary, but significant, effect of the new private remedy will be to reaffirm the position of the Consumer Protection Division as primarily an advocate for consumer interests of the state as a whole instead of public counsel on a case-by-case basis for individual consumers. The agency's main concern will be to halt deceptive and fraudulent practices and prevent their recurrence. Typically, it will not seek redress for particular persons who have suffered loss because of those practices.

The procedure for an aggrieved consumer to follow is, first, file a complaint with, or seek advice from, the Consumer Protection Division. Second, wait for that agency to obtain an injunction or other order of a court against the unlawful practice. Third, bring a private civil action to recover damages.[59] This gives the plaintiff the benefit of the injunction as prima facie evidence of a violation of the statute.[60]

With the Merchandising Practices Act Missouri has made marked progress toward providing consumers with an effective weapon to wield in the market place. *Independence Dodge* recognizes this legislative purpose and gives it effect.

DENNIS BARKS

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59. Interview, *supra* note 44. The procedure just outlined is not inflexible. Should the situation call for it, the division will continue to ask for compensation for victims of unlawful practices. There is, however, a definite legislative and administrative intent to make consumer protection in Missouri primarily an area of "self-help," with the state agencies performing those functions which are impractical for individuals to attempt. *Id.*

Shown below is a summary of division activity for 1973.

CONSUMER PROTECTION DIVISION
1973 ANNUAL ACTIVITY REPORT

JANUARY, 1973 through DECEMBER, 1973

	JEFFERSON CITY	*ST. LOUIS*	*KANSAS CITY*	*INNER-CITY*	*TOTAL*
COMPLAINTS:					
Opened	596	1219	923	234	2972
Closed	464	1571	477	71	2583
NOTICE OF INSTITUTION OF SUIT:	6	7	4	3	20
CIVIL INVESTIGATIVE DEMANDS ISSUED:	15	15	9	2	41
VOLUNTARY ASSURANCES ISSUED:	4	11	5	0	20
INJUNCTIONS ENTERED:	4	3	4	2	13
SUITS FILED:	2	5	5	3	15

60. § 407.025.8, RSMo 1974 Supp.

UNINSURED MOTORIST COVERAGE—VALIDITY OF ANTI-STACKING PROVISIONS AND WORKMEN'S COMPENSATION SET-OFF CLAUSE

Steinhaeufel v. Reliance Insurance Companies[1]

While driving his employer's truck, John Steinhaeufel was involved in a collision caused by the negligence of an uninsured motorist.[2] Steinhaeufel sustained injuries in the amount of $15,000.[3] His employer's insurance policy with Reliance Insurance Companies contained uninsured motorist coverage with a limit of $10,000.[4] Steinhaeufel's personal automobile insurance with State Farm Mutual Automobile Insurance Co. also included uninsured motorist coverage with a maximum limit of $10,000. Steinhaeufel sued both insurers. By stipulation he settled with Reliance for the maximum amount of its coverage, but State Farm denied that the remainder of Steinhaeufel's damages was covered under its policy.[5] State Farm relied on the first paragraph of the policy's "other insurance" clause, known as the "excess-escape" provision, which purported to limit coverage on the State Farm policy to the excess of its limits of liability over the limits of other insurance available.[6]

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1. 495 S.W.2d 463 (Mo. App., D. St. L. 1973).

2. The parties apparently agreed that the uninsured motorist was negligent. *Id.* at 465.

3. The court determined the amount of *Steinhaeufel's* damages. *Id.*

4. Uninsured motorist insurance provides coverage when the insured's injuries result from a collision with a negligently operated uninsured automobile. An uninsured automobile includes an automobile to which no bodily injury policy of at least the minimum limits specified in the financial responsibility law applies at the time of the accident, or a hit-and-run automobile. The issue whether the uninsured motorist was negligent and the amount of the insured's damages may be determined by agreement of the insured and insurer, or if they fail to agree, by arbitration. If the insured recovers on the policy, his insurer becomes entitled to all payments made by the uninsured motorist in satisfaction of a judgment or otherwise. *See* Standard Family Combination Automobile Policy, January 1, 1963 revision, CCH AUTO L. REP.-INS. ¶2271.

5. The maximum limit on plaintiff's policy with Reliance was $10,000, but Steinhaeufel agreed to a deduction of $2016.62, the amount he had received in workmen's compensation benefits. Reliance contended it was entitled to the deduction pursuant to the policy's workmen's compensation set-off provision. If Steinhaeufel had contested this deduction he could have recoverd the full $10,000 because the court in *Steinhaeufel* declared the workmen's compensation set-off clause void. *See* notes 32-42 and accompanying text *infra.*

6. The first paragraph of the policy's "other insurance" clause provided:

> Other Insurance.
>
> With respect to bodily injury to an insured while occupying an automobile not owned by a named insured under this coverage, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all other such insurance.

495 S.W.2d at 466. The second paragraph, the "pro-rata" clause, was not directly

Since its policy had a limit of $10,000 per person and the other insurance available (the Reliance policy) had the same limit, State Farm contended that there was no excess coverage over the limits of other insurance available, and thus it was not liable under the plaintiff's policy.[7]

The trial court entered judgment for the defendant State Farm. The Missouri Court of Appeals, St. Louis District, reversed, finding that the other insurance clause was void because it conflicted with the Missouri uninsured motorist statute.[8] By invalidating the "excess-escape" clause and allowing "stacking," of the two policies, the court followed the majority position,[9] and reflected the increasing hostility courts are displaying towards

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in issue in *Steinhaeufel*. See notes 22-25 and accompanying text *infra*.

Uninsured motorist coverage gives rise to several "stacking" or "pyramiding" problems which will be discussed. *Steinhaeufel* involves non-owned car stacking where the insured is injured while occupying a non-owned car and seeks to stack the policy covering the non-owned car and the policy covering his own car. Stacking also arises when the insured is injured by a negligent uninsured motorist while a pedestrian, or while driving his own car and has more than one policy covering his several cars.

7. The excess-escape clause is applicable by its terms when an insured incurs injury while occupying, either as driver or passenger, a car he does not own. The excess-escape clause makes the insurance applicable to the non-owned car the primary coverage; the insured's policy covering his own car is secondary coverage. The secondary insurer is, according to the clause, liable only to the extent the limits of the insured's policy exceed the limits of the other insurance available to the insured. To illustrate: If in *Steinhaeufel* the State Farm policy had provided for limits of $15,000/$30,000 and the Reliance policy had limits of $10,000/$20,000, the State Farm policy would have provided excess coverage of $5,000 per person and $10,000 per accident.

For a discussion of what "other insurance available" means in Missouri see Haseltine, *Uninsured Motorist Coverage–Other Insurance Clause–"Available" Interpreted*, 38 Mo. L. Rev. 340 (1973), *discussing* Gordon v. Maupin, 469 S.W.2d 848 (St. L. Mo. App. 1971).

8. The Missouri uninsured motorist statute, § 379.203, RSMo 1971 Supp., provides:

> No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in Section 303.030, RSMo, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. . . .

9. American Mut. Ins. Co. v. Romero, 428 F.2d 870 (10th Cir. 1970); Tulley v. State Farm Mut. Auto. Ins. Co., 345 F. Supp. 1123 (S.D.W. Va. 1972); Eggleston v. Townsend, 336 F. Supp. 1212 (D. Md. 1972); Simpson v. State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152 (S.D. Ind. 1970); Safeco Ins. Co. v. Jones, 243 So. 2d 736 (Ala. 1970); Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689 (Fla. 1966); State Farm Mut. Auto. Ins. Co. v. Murphy, 226 Ga. 710, 177 S.E. 2d 257 (1970); Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 457 P.2d 34 (1969); Crenwelge v. State Farm Auto. Ins. Co., 73 CCH Auto. L. Rep.-Ins. ¶7951 (La. App., March 12, 1973); Boetner v. State Farm Mut. Ins. Co., 34 Mich. App. 510, 191 N.W.2d 741 (1971); Bose v. American Family Mut. Ins. Co., 186 Neb. 209, 181 N.W.2d 839 (1970); State Farm Mut. Auto. Ins. Co. v. Christensen, 494 P.2d 552 (Nev. 1972); Moore v. Hartford Fire Ins. Co.,

any limitation on the statutorily mandated uninsured motorist coverage.[10]

Uninsured motorist insurance was available in most states at the insured's option before it was required by statute.[11] In construing the extent of this coverage courts generally upheld the validity of the other insurance clause and denied stacking, reasoning that since the other insurance clause was clear and unambiguous and did not contravene any strong public policy, the contract between the parties should be upheld.[12] When the coverage became mandatory, however, courts often took a different approach,[13] holding the excess-escape clause violated announced public policy by reducing uninsured motorist coverage below statutory minimums.[14]

A few courts have continued to uphold the validity of excess-escape clauses even after passage of uninsured motorist statutes.[15] The most common justification for this result is the notion that uninsured motorist statutes were designed only to secure coverage for the motorist negligently injured by an uninsured motorist up to an amount equal to the coverage the injured motorist would have benefitted from if the tortfeasor had been covered by insurance with maximum limits equalling that required by the state's financial responsibility laws.[16] This concept, known as substituted coverage,

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270 N.C. 532, 155 S.E.2d 128 (1967); Curran v. State Auto. Mut. Ins. Co., 25 Ohio St. 2d 33, 266 N.E.2d 566 (1971); Harleysville Mut. Cas. Co. v. Blumling, 429 Pa. 389, 241 A.2d 112 (1968); American Liberty Ins. Co. v. Ranzau, 473 S.W.2d 249 (Tex. App. 1971); Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965).

10. *See e.g.*, Webb v. State Farm Mut. Auto. Ins. Co., 479 S.W.2d 148 (Mo. App., D.K.C. 1972), *noted in* Hellmuth, *Uninsured Motorist Coverage-Validity of Medical Set-Off Clause,* 38 Mo. L. Rev. 346 (1973); in which the medical set-off provision was held invalid. In Gordon v. Maupin, 469 S.W.2d 848 (St. L. Mo. App. 1971), *noted in* Haseltine, *supra* note 7, decided prior to the enactment of the uninsured motorist statute, the other insurance clause was interpreted so as to expand the insured's protection.

11. *See e.g.*, Burcham v. Farmers Ins. Exch., 255 Iowa, 69, 121 N.W.2d 500 (1963); Horr v. Detroit Auto. Inter-Ins. Exch., 379 Mich. 562, 153 N.W.2d 655 (1967); Globe Indem. Co. v. Baker's Estate, 22 App. Div. 2d 658, 253 N.Y.S.2d 170 (1964).

12. *See* Horr v. Detroit Auto. Inter-Ins. Exch., 379 Mich. 562, 153 N.W.2d 655 (1967).

13. *Compare* Horr v. Detroit Auto. Ins. Exch., 379 Mich. 562, 153 N.W.2d 655 (1967) *with* Blakeslee v. Farm Bureau Mut. Ins. Co., 32 Mich. App. 115, 188 N.W.2d 216 (1971), *aff'd,* 73 CCH Auto. L. Rep.-Ins. ¶ 7633 (1972). *Horr,* involving two policies issued before enactment of the Michigan uninsured motorist statute (Mich. Comp. Laws Ann. § 500.310 (1967) denied stacking. *Blakeslee,* decided after the enactment of the statute, expressly distinguished *Horr* and allowed stacking.

14. *See* Blakeslee v. Farm Bureau Mut. Ins. Co., 32 Mich. App. 115, 188 N.W.2d 216 (1972), *aff'd,* 73 CCH Auto. L. Rep.-Ins. ¶ 7633 (1972).

15. Chandler v. Government Employees Ins. Co., 342 F.2d 420 (5th Cir. 1965); M.F.A. Mut. Ins. Co. v. Wallace, 245 Ark. 230, 431 S.W.2d 742 (1968); Tindall v. Farmers Auto. Management Corp., 81 Ill. App. 2d 165, 226 N.E.2d 397 (1967); Maryland Cas. Co. v. Howe, 213 A.2d 420 (Md. 1965); Martin v. Christensen, 22 Utah 2d 415, 454 P.2d 294 (1969).

16. The courts that uphold the excess-escape clause reason that the uninsured motorist statute requires only that a fund with the statutory minimum limits be available to the insured once, and that a provision which does not reduce this minimum fund is valid. The so-called substituted coverage doctrine has had a

is reflected also in the expressions of some courts to the effect that allowing stacking would give a windfall to a party injured by an uninsured motorist as opposed to a motorist covered by insurance complying with the minimum standards of the local safety responsibility law.[17]

Steinhaeufel rejected the substituted coverage rationale, holding that the legislature had placed no maximum limit on coverage and could not have intended that the coverage be only a substitute for minimum financial responsibility.[18] The court pointed out that rigorous adherence to the substituted coverage theory could leave one who would otherwise be protected by his own uninsured motorist clause without financial recourse in cases where other injured parties had already appropriated the full limits of the primary coverage.[19] *Steinhaeufel* does not hold the excess-escape clause

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checkered career in Missouri as elsewhere. The doctrine is theoretically sound because the uninsured motorist statute is tied to the financial responsibility statutes: the uninsured motorist coverage must be "not less than the limits for bodily injury or death set forth in section 303.030 RSMo . . . ." § 379.203, RSMo 1969. Webb v. State Farm Mut. Auto. Ins. Co. 479 S.W.2d 148 (Mo. App., D.K.C. 1972), enthusiastically embraced the substituted coverage theory at least to the extent it provides a minimum level of recovery where medical set-offs of uninsured motorist coverage are involved. *Id.* at 152. For a discussion of *Webb* approvingly cited in *Steinhaeufel* see Hellmuth, *supra* note 10, at 347, 354 n.41. *Compare* Gordon v. Maupin, 469 S.W.2d 848 (St. L. Mo. App. 1971), in which the court rejected the substituted coverage doctrine. *See* note 19, *infra.*

17. The court in *Steinhaeufel* states:

> Another theory argued in other jurisdictions has been that it was not the intention of the legislature to provide a windfall to those who had been injured in accidents caused by drivers of automobile covered by the standard automobile insurance policy.

495 S.W.2d at 467. The court apparently omitted the word "not" before "covered"; otherwise the sentence makes no sense. Missouri's Financial Responsibility Law requires a driver to have coverage with minimum limits of $10,000/$20,000. § 303.030 RSMo 1971 Supp. An injured party could recover more than the statutory amounts if he has the fortuity to collide with an uninsured motorist because several policies may then apply.

18. By not placing a maximum limit on the amount of uninsured motorist coverage an insured can purchase, the legislature left open the possibility of an insured being in a better position if hit by an uninsured motorist than by an insured motorist, even where only one policy applies. *Steinhaeufel* used this reasoning to substantiate its conclusion that the legislature did not intend the statutory uninsured motorist coverage to provide only substitute coverage and no more.

19. Gordon v. Maupin, 469 S.W.2d 848 (St. L. Mo. App. 1971), decided prior to the enactment of the uninsured motorist statute, is an instance where other injured parties had appropriated most of the funds of the uninsured motorist coverage. The other insurance clause was under consideration with respect to the meaning of "other insurance available." The plaintiff, one of four occupants, sustained injuries in the amount of $5,000. The automobile plaintiff occupied had uninsured motorist coverage with limits of $5,000/$10,000. The plaintiff had a policy with the same insurer on her own car that included uninsured motorist coverage with the same limits. The insurer paid $8397 to the driver and the other two guest passengers on the first policy. The insurer claimed that its liability to the plaintiff on the first policy was $1603 and that it was not liable on her own policy. The plaintiff contended that other insurance was available to the extent of $1603, and that her own policy provided the excess coverage of $3397 ($5000-$1603). The insurer relied on the substituted coverage doctrine. If the negligent driver had been covered by a policy with limits of $5000/$10,000,

unreasonable; the clause is unenforceable because the uninsured motorist statute precludes any limitation on liability.[20]

In addition to the excess-escape clause, uninsured motorist insurance includes other limitations and exclusions that are of questionable validity after *Steinhaeufel*.[21] The "pro-rata" provision of the other insurance clause

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plaintiff and the other three occupants would have competed for a fund of only $10,000. The insurer asserted that the substituted coverage rationale behind uninsured motorist coverage dictated that the available fund be no larger than $10,000 if the driver was uninsured. The court rejected the substituted coverage rationale and held that "other insurance available" meant insurance "actually available" and not "theoretically available."

20. There are several extensions of *Steinhaeufel* which may be litigated in the future. Suppose the plaintiff owned two personal cars, each insured by a separate policy containing uninsured motorist coverage. To the extent the excess-escape provision is unenforceable both these policies could be pyramided atop any primary coverage that might be available. Simpson v. State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152 (S.D. Ind. 1970), involved this fact situation. The court approved stacking, saying:

> The premium paid with respect to each policy of insurance necessarily includes an amount in payment of the uninsured motorist coverage; it would be unconscionable to permit insurers to collect a premium for a coverage which they are required by statute to provide, and then to avoid payment of a loss because of language of limitation devised by themselves.

Id. at 1156.

Suppose the plaintiff in *Simpson* owned two cars which were covered by the same policy. The question might arise whether each car is covered by a separate uninsured motorist endorsement, and if so, whether the coverage could be stacked to increase the limits of liability. Because policies insuring two cars include a separate premium for each car for uninsured motorist coverage, the insured is arguably purchasing separate uninsured motorist coverage for each car, exactly as if the cars were covered by separate policies, and stacking should be allowed. *See* Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 457 P.2d 34 (1969).

Even though a separate premium is paid for each car under the same policy, the premium for each additional car is less than the premium for the first car. In American Liberty Ins. Co. v. Ranzau, 473 S.W.2d 249 (Tex. Civ. App. 1971), *aff'd*, 481 S.W.2d 793 (Tex. 1972), the defendant insurer convinced the court that the premium differential for additional cars was due to the non-owned car coverage. Defendant asserted that the premium for the first car is composed of two elements: the premium covering the insured while driving the insured car, and the premium for non-owned car and pedestrian exposure. The premium for additional cars was assertedly to cover the insured only while driving that car; hence, the premium for non-owned car coverage and pedestrian coverage was paid only once. The insured was not allowed to stack the coverage.

21. The "pro-rata" clause, Standard Family Combination Automobile Policy, January 1, 1963 revision provides:

> [e]xcept as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

CCH AUTO. L. REP.-INS. ¶ 2315.

is applicable when two or more policies provide *coverage of the same level*[22] to the insured. For example, suppose two policies cover the same claim, one policy with a limit of $10,000 per person and the other policy with a $15,000 per person limit. If stacking were allowed the total potential coverage would be $25,000 for one person. The pro-rata clause, however, would prohibit stacking by limiting total recovery on all applicable policies to the limits of recovery of the policy with the highest limits, in this instance, $15,000. Thus this feature of the pro-rata clause acts precisely like the "excess escape" clause and attempts to prohibit stacking. After *Steinhaeufel* this feature of the pro-rata provision is probably ineffective for the same reason the "excess escape" clause is ineffective—it attempts to limit the insurer's uninsured motorist coverage in a manner not provided for in the uninsured motorist statute.[23]

The second part of the pro-rata clause apportions liability among the available policies according to their policy limits.[24] This feature of the clause would probably withstand a *Steinhaeufel* attack insofar as it does not limit the insured's total recovery but only apportions liability between the insurers.[25]

A third anti-stacking clause found in many uninsured motorist policies, the "exclusionary" clause,[26] purports to preclude "owned car" stacking.[27] This clause excludes from coverage injuries the insured sustains while occupying another automobile he owns. Although it is subject to a *Steinhaeufel* attack, it may involve different policy considerations. Some courts have found that the "exclusionary clause" does not conflict with uninsured motorist statutes,

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22. "'Coverage of the same level" means that the policies are applicable to the claim simultaneously, as distinguished from the situation where one policy is primary coverage and another policy provides secondary coverage. One such instance of simultaneous coverage is where a pedestrian, hit by a negligent uninsured motorist, is the owner of two cars, each insured by a separate policy containing uninsured motorist coverage. The policies simultaneously cover the insured while he is a pedestrian and neither policy is subordinate to the other policy's coverage. In this situation, the pro-rata clause apportions the liability between the insurers.

23. *See* note 21 *supra.*

24. For example: Plaintiff suffers $10,000 damages, and has two policies with limits of, say, $10,000 and $15,000. The first policy will provide 40 percent of the coverage ($10,000/$25,000).

25. If the second part of the clause were invalid, the insured could recover his damages from either insurer at his option. The clause limits the insured's freedom in choosing from which insurer to recover.

26. The exclusionary clause (Standard Family Combination Automobile Policy, January 1, 1963 revision, CCH AUTO. LAW REP.-INS. ¶ 2306) provides:

> Exclusions. This policy does not apply under [Uninsured motorist coverage]: (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile.

27. "Owned-car" stacking refers to the situation where an insured, while occupying one of several cars which he owns, sustains injuries in a collision caused by an uninsured motorist, and each of his cars is insured by a separate policy containing uninsured motorist coverage. The owner of the cars is an insured under each policy and theoretically would be able to recover on all policies. The "exclusionary" clause attempts to preclude this possibility. Standard Family Combination Automobile Policy, January 1, 1963 revision, CCH AUTO. L. REP.-INS. ¶ 2306.

based primarily on their fear that to hold otherwise would allow an insured to purchase uninsured motorist protection on one owned vehicle and claim uninsured motorist protection thereunder while driving any number of unisured vehicles he owns.[28] This consideration is inapplicable to the other types of anti-stacking clauses previously discussed.[29]

Courts that allow owned-car stacking counter this argument by reasoning that the exclusionary clause contravenes the uninsured motorist statute by attempting to limit liability where the statute did not provide for such limitation.[30] These courts have found a legislative intent to protect persons, not vehicles.[31] Thus, it is irrelevant which car the insured was occupying.

Steinhaeufel also deals with another attempt by insurers to limit liability under uninsured motorist coverage, the workmen's compensation set-off provision.[32] The issue is raised because Steinhaeufel was injured in the course of his employment with Griffith Brokerage Company, the owner of the truck involved in the collision. Steinhaeufel received $2016.62 in workmen's compensation benefits.[33] State Farm contended that if it were liable

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28. Owens v. Allied Mut. Ins. Co., 15 Ariz. App. 181, 487 P.2d 402 (1971); Holcomb v. Farmers Ins. Exch., 73 CCH AUTO. L. REP.-INS. ¶ 7886 (Ark., May 21, 1973); Dhane v. Trinity Universal Ins. Co., 73 CCH AUTO. L. REP.-INS. ¶ 7925 (Tex. Civ. App., June 14, 1973).

29. The previous stacking hypotheticals involve situations in which the insured has been injured while either occupying a car not owned by him or as a pedestrian.

The uninsured motorist coverage is mandatory in Missouri unless the insured rejects it in writing. § 379.203, RSMo 1971 Supp. A court may be hesitant to allow an insured to recover on the coverage applicable to one of his cars when he was injured while driving a car on which he had deliberately rejected the uninsured motorist coverage.

30. Bass v. State Farm Mut. Auto. Ins. Co., 73 CCH AUTO. L. REP.-INS. ¶ 7751 (Ga. App., Jan. 31, 1973); Gulf American Fire & Cas. Co. v. McNeal, 115 Ga. App. 286, 154 S.E.2d 411 (1967); Deterding v. State Farm Mut. Auto. Ins. Co., 78 Ill. App. 29, 22 N.E.2d 523 (1966); Crenwelge v. State Farm Mut. Auto. Ins. Co., 73 CCH AUTO. L. REP.-INS. ¶ 7951 (La. App., March 12, 1973); Boetner v. State Farm Mut. Ins. Co., 34 Mich. App. 510, 191 N.W.2d 741 (1971), *aff'd*, 73 CCH AUTO. L. REP.-INS. ¶ 7634 (1972); Lipscomb v. Security Ins. Co., 213 Va. 81, 189 S.E.2d 320 (1972).

31. Lipscomb v. Security Ins. Co., 231 Va. 81, 83, 189 S.E.2d 320, 322 (1972).

32. The workmen's compensation set-off provision of the plaintiff's policy was not set forth in *Steinhaeufel*. The Standard Family Combination Automobile Policy provides:

> Limits of Liability
>
> . . . .
>
> b. Any amount payable under the terms of [Uninsured Motorist] because of bodily injury sustained in an accident by a person who is insured under this part [Uninsured Motorist] shall be reduced by
>
> . . . .
>
> (2) The amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law.

Standard Family Combination Automobile Policy, January 1, 1963 revision, CCH AUTO. L. REP.-INS. ¶ 2311. For a discussion suggesting that the exact wording of a set-off clause may be crucial see Hellmuth, *supra* note 10.

33. 495 S.W.2d at 468.

under the uninsured motorist coverage, then pursuant to the workmen's compensation set-off provision its liability should be reduced by the amount paid to Steinhaeufel in compensation benefits.

The court rejected State Farm's contention for two reasons. The first is peculiar to the facts in *Steinhaeufel*. Under the settlement agreement with Reliance, Steinhaeufel received the $10,000 policy maximum reduced by the amount he had received in workmen's compensation benefits. Granting State Farm the set-off would have allowed a double set-off for the same recovery.

The court also rejected State Farm's contention because it found the set-off provision void because it conflicted with the Missouri uninsured motorist statute.[34] The court did not explain the reasoning behind this conclusion, but simply relied on *Webb v. State Farm Mutual Automobile Insurance Co.*[35] In *Webb* the Missouri Court of Appeals, Kansas City District, held the medical expense set-off provision void because it conflicted with the uninsured motorist statute[36] by attempting to reduce the uninsured motorist coverage below the statutory minimum.[37] But, *Webb* adopted the substituted coverage rationale as the most convincing basis for its decision.[38] By wholeheartedly embracing *Webb* as precedent without discussing its substituted coverage aspects, *Steinhaeufel* is self-contradictory; it rejects a theory in one part of its opinion[39] that is a major aspect of the rationale behind another part of the opinion.[40] A resolution to this contradiction is suggested by noting that the substituted coverage doctrine was alternatively accepted or rejected to afford the insured the most coverage.[41]

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34. § 379.203, RSMo 1971 Supp.
35. 479 S.W.2d 148 (Mo. App., D.K.C. 1972).
36. § 379.203, RSMo 1971 Supp.
37. 479 S.W.2d at 140.
38. The *Webb* court stated,

> We also cited with approval the view, then as now generally held, that the purpose of uninsured motorist statute "is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured . . . by an automobile covered by a standard liability policy."

Id. at 151, *quoting from* Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 133, 136 (1968).

39. 495 S.W.2d at 467.
40. *Id.* at 468.
41. *Steinhaeufel* is in accord with the majority of courts that have considered the validity of the workmen's compensation set-off provision. Booth v. Seabord Fire & Marine Ins. Co., 431 F.2d 212 (8th Cir. 1970); State Farm Mut. Auto. Ins. Co. v. Cahoon 252 So. 2d 619 (Ala. 1971); Allied Mut. Ins. Co. v. Larriva, 507 P.2d 997 (Ariz. App. 1973); Travelers Ins. Co. v. National Farmers Union Property & Cas. Co., 480 S.W.2d 585 (Ark. 1972); Nationwide Mut. Ins. Co. v. Hillyer, 509 P.2d 810 (Colo. App. 1973); Williams v. Buckelen, 246 So. 2d 58 (La. 1971); Brunmeier v. Farmers Ins. Exch., 208 N.W.2d 860 (Minn. 1973); Sullivan v. Doe, 495 P.2d 193 (Mont. 1972); Peterson v. State Farm Mut. Auto. Ins. Co., 238 Ore. 106, 393 P.2d 651 (1964); Ferguson v. State Farm Mut. Auto. Ins. Co., 198 S.E.2d 522 (S.C. 1973); Fidelity & Cas. Co. v. McMahon, 487 S.W.2d 371 (Tex. Civ. App. 1972).

Decisions contrary to *Steinhaeufel* that have held the workmen's compensation set-off provision valid have followed a strict substituted coverage rationale and have been in jurisdictions where the workmen's compensation carrier is

Steinhaeufel is indicative of a definite trend in Missouri towards expanding uninsured motorist coverage beyond its niggardly $10,000/$20,000 legislative minimums by invalidating various set-off clauses.[42] Although this is certainly a worthy objective, it is productive of much litigation and uncertainly of coverage. The best approach would be for the legislature to delineate explicitly those set-offs which should be allowed and require that insurance companies make uninsured motorist coverage readily available to the public with protection in excess of $10,000/$20,000 limits (upon payment of a suitable additional premium), at the option of the insured.[43]

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subrogated to the rights of the insured against the tortfeasor. Jarrett v. Allstate Ins. Co., 209 Cal. App. 2d 804, 26 Cal. Rptr. 231 (1962) (no uninsured motorist statute in effect); Standard Accident Ins. Co. v. Gavin, 184 So. 2d 229 (Fla. App. 1966), *cert. denied*, 196 So.2d 440 (Fla. 1967), Ullman v. Wolverine Ins. Co., 269 N.E.2d 295 (Ill. 1970), Niekamp v. Allstate Ins. Co., 52 Ill. App. 2d 364, 202 N.E.2d 126 (1964) (where no uninsured motorist statute was in effect); Michigan Mut. Liab. Co. v. Mesner, 2 Mich. App. 350, 139 N.W.2d 913 (1966); Hackman v. American Mut. Liab. Ins. Co., 261 A.2d 433 (N.H. 1970); Durant v. Motor Vehicle Accident Indemn. Corp., 15 N.Y.2d 408, 260 N.Y.S.2d 1 (1965).

42. *See* note 10 *supra.*

43. The stacking issue has been faced squarely by the state legislatures in Iowa and Tennessee, where statutes expressly incorporate the substituted coverage theory to avoid stacking. IOWA CODE ANN. § 516A.2 (1967) says:

> Nothing contained in this chapter shall be construed as requiring forms of coverage provided pursuant hereto, whether alone or in combination with similar coverage afforded under other automobile liability or motor vehicle liability policies, to afford limits in excess of those that would be afforded had the insured thereunder been involved in an accident with a motorist who was insured under a policy of liability insurance with the minimum limits for bodily injury or death prescribed in Subsection 10 of Section 321A.1. Such forms of coverage may include terms, exclusions, limitations, conditions, and offsets which were designed to avoid duplication of insurance or other benefits.

The Tennessee provision is similar. *See* TENN. CODE ANN. § 56-1152 (1967).

CONSTITUTIONAL LAW—THE GOVERNOR'S ITEM VETO POWER

State ex rel. Cason v. Bond[1]

The 77th General Assembly of the State of Missouri adopted an appropriation bill, Conference Committee Substitute for House Bill No. 16 (hereinafter C.C.S.H.B. 16), which provided funds for emergency and supplemental purposes. The bill was sent to Governor Bond, who on April 3, 1973, signed and returned the bill to the legislature, but only after making partial vetoes of certain sections. Accompanying the bill was the Governor's explanation in his veto message to the House of Representatives. The partial vetoes were made by striking language that designated the purpose of the appropriations without vetoing the sum appropriated.[2]

Relators, asserting standing as taxpayers and as members of the 77th General Assembly,[3] sought from the Missouri Supreme Court a writ of mandamus[4] directing the authorization or issuance of warrants[5] for the

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1. 495 S.W.2d 385 (Mo. En Banc 1973).

2. *Id.* at 387-88. The Governor's partial vetoes involved §§ 16.490-.520 of C.C.S.H.B. 16. The following sections of C.C.S.H.B. 16 are examples.

Section 16.500. To the Office of Administration
For Capitol Building Renovation ~~(West Side)~~
From General Revenue.....$1,100,000.00
Section 16.500. I hereby veto and delete from Section 16.500 the words "(West Side)" for the reason that the renovation needs of the Capitol Building are not limited to the West Side.
Section 16.520. To the Department of Agriculture
For payment ~~to the following companies~~ for work performed in connection with the 1972 State Fair and necessary operational expenses
~~March 1 thru June 30, 1973~~
~~Danville Tent and Awning.....$ 15,192.58~~
~~Lamberth Plumbing and Heating..... 30,840.49~~
~~Queen City Electric..... 45,916.61~~
~~Operation (from March 2 thru June 30, 1973)..... 38,993.00~~
From General Revenue.....$130,942.68
From State Fair Fees Fund..... 40,448.00
Total .....$171,390.68"
Section 16.520. I hereby veto and delete from Section 16.520 the words "to the following companies"; "from March 1 thru June 30, 1973
Danville Tent and Awning.....$ 15,192.58
Lamberth Plumbing and Heating..... 30,840.49
Queen City Electric..... 45,916.61
Operation (from March 1 thru June 30, 1973)..... 38,993.00"; and "(from March 1 thru June 30, 1973)" for the reason that such language is unnecessary.

3. The Court found that the relators had standing as taxpayers to maintain the action and, therefore, did not address itself to the question whether the relators would have standing as members of the General Assembly. 495 S.W.2d at 386.

4. Mandamus is available to compel an official to perform a ministerial duty which it is his clear legal duty to perform. 18 U.K.C.L. REV. 173 (1950). *See also* State *ex. rel.* Hixson v. Nerry, 105 Mo. App. 458, 79 S.W.993 (St. L. Ct. App. 1904).

5. MO. CONST. art. IV, § 28 (1972 amend.) states:
No money shall be withdrawn from the state treasury except by warrant

expenditures under the appropriation bill. The application for the writ requested that the warrants be limited to the purposes as specified by the 77th General Assembly and that no effect be given to the Governor's deletions in his partial veto.[6]

The office of Commissioner of Administration, who must certify all warrants for expenditures before money can be withdrawn from the state treasury,[7] was vacant. Pursuant to Missouri law,[8] the Governor assumed that office. Therefore relators named as respondents Governor Bond in his position as Acting Commissioner of Administration, State Treasurer Spainhower,[9] and Governor Bond in his official position as Governor. No relief was sought against Governor Bond in the latter capacity.[10]

In holding that the partial veto was a nullity, the Missouri Supreme Court concluded that mandamus would lie against the Governor in his capacity as Acting Commissioner of Administration, that the power of the Governor to veto an appropriation bill was limited, and that the effect of an invalid partial veto was that the bill becomes law as if the Governor had approved it in toto. These three aspects of the decision are discussed below.

Respondents questioned whether the Missouri Supreme Court had jurisdiction to grant the relief sought against Governor Bond as Acting Commissioner of Administration,[11] contending that mandamus did not lie because its issuance would violate the separation of powers doctrine.[12]

The established rule in Missouri was that mandamus would not lie against the Governor, even if the duty was ministerial and one that could have been assigned to another officer who would be amenable to the court's process.[13] The rationale is that the duty is nevertheless an official

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drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the commissioner of administration certifies it for payment . . . .

6. 495 S.W.2d at 386.

7. Mo. CONST. art. IV, § 28 (1972 amend.).

8. § 26.300 (9), LAWS of 1971.

9. *See* §§ 30.160, .180, .410, RSMo 1969.

10. 495 S.W.2d at 386. The writer found no explanation why relators named Governor Bond as Governor but sought no relief against him in that capacity. Perhaps the relators named him before discovering that mandamus will not lie against the Governor as Governor. *See* State *ex. rel.* Robb v. Stone, 120 Mo. 428, 25 S.W. 376 (1894).

11. Brief for Respondents at 10-15, State *ex rel.* Cason v. Bond, 495 S.W.2d 385 (Mo. En Banc 1973).

12. Mo. CONST. art. II, §1.

13. Mandamus will not lie against the Governor, State *ex rel.* Bartley v. Fletcher, 39 Mo. 388 (1867), even for the performance of a ministerial duty. State *ex rel.* Robb v. Stone, 120 Mo. 428, 25 S.W. 376 (1894).

In State *ex rel.* Donnell v. Osburn, 347 Mo. 469, 147 S.W.2d 1065, 1070 (En Banc 1941), the court interpreted *Robb*:

> There we refused to issue mandamus against the governor on the ground that the performance or nonperformance of every duty placed upon the governor, who has 'supreme executive power,' involved the exercise of executive duty with which this court could not interfere.

The court in the instant case reiterated *Donnell's* interpretation of *Robb*: "The Robb decision was interpreted later by this Court in the *Donnell* case, supra, as

duty of the Governor,[14] and the performance or nonperformance of every duty placed on the Governor involves the exercise of executive duty with which the courts cannot interfere.[15] Here, relief was sought against the Governor acting as an executive officer against whom mandamus will normally lie.[16] Although there was authority to the contrary,[17] the court established a limited exception to the general rule by holding that it had jurisdiction to issue the writ of mandamus.[18]

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meaning that mandamus would not lie against the Governor where it would interfere with the exercise of executive duty and discretion." 495 S.W.2d at 389. The latter quote might be interpreted to mean that mandamus will lie against the Governor for the performance of a ministerial duty. This seemingly small linguistic change may have been necessary for the supreme court to find that it had jurisdiction to issue a writ of mandamus against the Governor as Acting Commissioner of Administration; it is, however, a complete reversal from *Robb* and *Donnell*. There is no other indication that *Robb* is not good law, and to say that mandamus would not lie against the Governor where it would interfere with the exercise of executive duty and discretion could mean that mandamus will not issue against the Governor at all, because, according to *Robb* and *Donnell*, every duty placed on the governor involves the exercise of executive duty with which the court will not interfere. *See* Rice v. Austin, 19 Minn. Rep. 103, 18 Am. Rep. 330 (1872); Annot., 105 A.L.R. 1124 (1936).

14. State *ex rel.* Robb v. Stone, 120 Mo. 428, 25 S.W. 376 (1894).

15. State *ex rel.* Donnell v. Osburn, 347 Mo. 469, 147 S.W.2d 1065 (En Banc 1941).

16. *See* State *ex rel.* S.S. Kresge Co. v. Howard, 357 Mo. 302, 208 S.W.2d 247 (En Banc 1947).

17. State *ex rel.* Robb v. Stone, 120 Mo. 428, 25 S.W. 376 (1894). J. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES § 120 (3d ed. 1896), states:

> [T]he chief executive of the state is, as to the performance of any and all official duties, entirely removed from the control of the courts, and that he is beyond the reach of mandamus, not only as to duties of a strictly executive or political nature, but even as to purely ministerial acts whose performance the Legislature may have required at his hands.

In Huidekoper v. Hadley, 177 F. 1 (8th Cir. 1910), it was held that mandamus would not lie against the Governor of Missouri as a member of the State Board of Equalization. This case was not cited in State *ex rel.* Cason v. Bond.

In deciding that it had jurisdiction to issue the writ of mandamus the Court cited State *ex rel.* Donnell v. Osburn, 347 Mo. 469, 147 S.W.2d 1065 (En Banc 1941), which held that mandamus would lie against the speaker of the House of Representatives for the performance of a ministerial duty without violating the separation of powers doctrine. The Court also cited State *ex inf.* Barrett *ex rel.* Bradshaw v. Hedrich, 294 Mo. 21, 241 S.W. 402 (En Banc 1922), to show that State *ex rel.* Robb v. Stone, 120 Mo. 428, 25 S.W. 376 (1894), which held that mandamus would not lie against the Governor, did not apply to cases between persons other than the Governor wherein the validity of acts of the Governor are determined. 495 S.W.2d at 389. The Court did not acknowledge that the case before it was not such a case, but instead was a case between persons including the Governor as Acting Commissioner of Administration.

18. 495 S.W.2d at 389. *See* State *ex inf.* Barrett *ex rel.* Bradshaw v. Hedrick, 294 Mo. 21 241 S.W. 402 (En Banc 1922); Dennett, Petitioner, 32 Me. 508, 54 Am. Dec. 602 (1858); State *ex rel.* Latture v. Frazier, 114 Tenn. 516, 86 S.W. 319 (1904); Rice v. Austin, 19 Minn. Rep. 103, 18 Am. Rep. 330 (1872). For a general discussion of whether mandamus should lie against the Governor see Annot., 105 A.L.R. 1124 (1936).

The court next dealt with the merits, namely, whether article IV, section 26 of the Missouri Constitution[19] authorized the Governor's deletion of language stating the purposes of the appropriations.[20] The early constitutions of Missouri authorized the Governor to make general vetoes of legislation only,[21] but the 1875 Constitution gave him item veto power.[22] This power is now expressed in article IV, section 26 of the constitution,[23] which provides that the Governor may veto one or more items or portions of items of an appropriation bill while approving other portions of the bill. A majority of the states have adopted similar constitutional provisions.[24] The original purpose of such constitutional provisions was to avoid the practice of adding to an appropriation bill legislation unrelated to the appropriation of public moneys.[25] Today, the purpose of the Missouri provision is to give the Governor tighter control over expenditures of public funds.[26]

Seemingly, the term "items or portions of items of appropriation" is unambiguous, but the quantity of litigation in other jurisdictions belies that premise.[27] A leading case is *In re Opinion of the Justices*,[28] in which it was stated that "items" or "parts of items" referred to separable fiscal units.[29] The Massachusetts court decided that the Governor's item veto power did not allow him to strike conditional language and leave the sum appropriated intact.[30] In *Commonwealth v. Dodson*[31] the Virginia Supreme Court defined

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19. Mo. CONST. art. IV, § 26:
> The governor may object to one or more items or portions of items of appropriation of money in any bill presented to him, while approving other portions of the bill. On signing it he shall append to the bill a statement of the items or portions of items to which he objects and such items or portions shall not take effect.

See also §26.030, RSMo 1969: "The governor may veto any item or portion of any item of any appropriation bill or the whole theref . . . ."

20. *See* note 2 *supra*. For a complete seriatim of Governor Bond's partial vetoes of §§ 16.490-.510 of C.C.S.H.B. 16 see 495 S.W.2d at 387-88.

21. Mo. CONST. art. IV, § 10 (1820); Mo. CONST. art. V, § 9 (1865).

22. Mo. CONST. art. V, § 13 (1875).

23. *See* note 19 *supra*.

24. Beckman, *The Item Veto Power of the Executive*, 31 TEMP. L.Q. 27 (1957); Annot., 35 A.L.R. 600 (1925).

25. *See* Beckman, *supra* note 24. This practice should no longer be a problem in Missouri because the inclusion of legislation of a general character in an appropriation bill is unconstitutional. Mo. CONST. art. III, § 23; State *ex rel.* Gaines v. Canada, 342 Mo. 121, 113 S.W.2d 783 (En Banc 1937); *cert. granted* 305 U.S. 580, *rev'd on other grounds*, 305 U.S. 337 (1938); State *ex rel.* Davis v. Smith, 335 Mo. 1069, 75 S.W.2d 828 (En Banc 1934).

26. Mo. CONST. art. IV, § 27; 18 DRAKE L. REV. 245, 253 (1969).

27. *See* Beckman, *supra* note 24, at 28; 25 GEO. L.J. 106, 131 (1936); Annot., 35 A.L.R. 600 (1925).

28. 294 Mass. 616, 2 N.E.2d 789 (1936).

29.
> No power is conferred to change the items of an appropriation except by reducing the amount thereof. Words or phrases are not "items or parts of items." This principle applies to the conditions attached to the appropriation now in question. The condition is not an item or a part of an item.

Id. at 620, 2 N.E.2d at 790.

30. *Id.* at 621, 2 N.E.2d at 791.

31. 176 Va. 281, 11 S.E.2d 120 (1940).

"item" as something that may be taken out of a bill without affecting its other purposes or provisions; something that may be lifted bodily from instead of cut out of an appropriation bill.[32] The Governor's veto power, the court concluded, does not carry with it the power to strike out conditions or restrictions— that would be legislating.[33] The court said that an "item" in an appropriation bill is something different from a provision or condition; it is an indivisible sum of money for a stated purpose.[34]

The Missouri court held that the Governor's item, or separable sum,[35] veto power does not include authority to strike words stating the purpose of the appropriation,[36] adopting the principle that conditional language directing how a specific sum shall be spent cannot be stricken without vetoing the appropriation of the specific sum.[37] The Court noted that the Governor was participating in the legislative process[38] and said that any doubt regarding the legislature's power should be resolved in its favor.[39] The Governor does have the power, the court acknowledged, to veto individual items in a lump sum appropriation bill, but only if he reduces the lump sum accordingly.[40]

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32. *Id.* at 290, 11 S.E.2d at 124.

33. *Id.* at 296, 11 S.E.2d at 127. The Governor's veto of conditional language of an appropriation bill would not be the disapproval of "items" or "parts of items," but would be affirmative legislation. Fitzsimmons v. Leon, 141 F.2d 886 (1st Cir. 1944).

34. 176 Va. at 296, 11 S.E.2d at 127.

35. The court defined "item" as a separable sum. 495 S.W.2d at 392.

36. *Id. See* State *ex rel.* Turner v. Iowa State Highway Comm'n, 186 N.W.2d 141 (Iowa 1971), where the Iowa Supreme Court stated that a provision of an appropriation bill which required that the permanent resident engineer's office remain in its present location was an "item" subject to the Governor's item veto power because it did not direct the use of moneys appropriated. *See also* Brown v. Fergusen, 32 Ohio St. 2d 245, 291 N.E.2d 434, (1972).

37. *Id. See* Fairfield v. Foster, 25 Ariz. 146, 214 P. 319 (1923); Miller v. Walley, 122 Miss. 521, 84 So. 466 (1920); Fulmore v. Lane, 104 Tex. 499, 140 S.W. 405 (1911); State *ex rel.* Teachers & Officers v. Holder, 76 Miss. 158, 23 So. 643 (1898).

38. 495 S.W.2d at 392. *See* State *ex rel.* Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017 (En Banc 1921).

39. Brown v. Morris, 365 Mo. 946, 290 S.W.2d 160 (1956); Bohrer v. Toberman, 360 Mo. 244, 227 S.W.2d 719 (En Banc 1950).

40. 495 S.W.2d at 392. *See* Commonwealth v. Dodsen, 176 Va. 281, 11 S.E.2d 120 (1940); *In re* Opinion of the Justices, 294 Mass. 616, 2 N.E.2d 789 (1936); State *ex rel.* Teachers & Officers v. Holder, 76 Miss. 158, 23 So. 643 (1898).

In Green v. Rawls, 122 So. 2d 10 (Fla. 1960), the court upheld the veto of a lesser sum which was included in the lump sum appropriated without reduction of the lump sum by an equal amount. In Reardon v. Riley, 76 P.2d 101 (Cal. 1938), the court upheld the Governor's veto of specific items and the reduction of the lump sum appropriated by a lesser amount than the total of the vetoed items. Two other California cases allow the Governor to veto smaller included items of a lump sum and leave the lump sum appropriated intact. Pomeroy v. Riley, 12 Cal. 2d 166, 82 P.2d 697 (1938); R.R. Comm'n. v. Riley, 12 Cal. 2d 54, 82 P.2d 394 (1938). In Regents v. Trapp, 28 Okla. 83, 113 P. 910 (1911), the court stated that the Governor must approve or disapprove the lump sum appropriation and may not veto any of the smaller included items even if he would reduce the lump sum appropriation by an equal amount.

The final question in the case is the effect of an invalid item veto. Does the bill become law as if the Governor had approved it in its entirety, or does the entire bill fail because it lacks the Governor's approval? The majority of jurisdictions hold, based on the public interest in the appropriation,[41] that an invalid veto is a nullity and the appropriation bill passes as if the Governor had approved the entire bill.[42] A minority holds that the bill does not become law because there is no concurrence of approval between the Governor and the legislature.[43] Although the Missouri Constitution requires that the Governor approve all bills passed by both houses,[44] the court stated that the Governor's veto was unauthorized and a nullity.[45] By issuing the writ of mandamus, the Court allowed C.C.S.H.B. 16 to become law as if the Governor had approved the entire bill.[46]

To conclude, the item veto is limited to vetoing both a specific sum and its stated purpose. This result accords with the general trend of state decisions.[47] Perhaps a different view of what constitutes an "item or portions of items" of appropriation would promote the constitutional policy of greater executive control over public expenditures.[48] Yet, the view expressed by the Missouri Supreme Court does uphold the concept of the Governor's veto power as only a negative one,[49] and not including the power to enact legislation.[50] This is proper because it is within the legislature's discretion to determine the best use of public funds.[51]

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41. Beckman, *supra* note 24, at 34.
42. White Taxicab Co. v. Standard Oil Co., 25 Ariz. 381, 218 P. 139 (1923); Porter v. Hughes, 4 Ariz. 1, 32 P. 165 (1893); Wheeler v. Gallet, 43 Idaho 175, 249 P. 1067 (1926); State *ex rel.* Turner v. Iowa State Highway Comm'n., 186 N.W.2d 141 (Iowa 1971); *In Re* Opinion of the Justices, 294 Mass. 616, 2 N.E.2d 789 (1936); Wood v. State Administrative Board, 255 Mich. 220, 238 N.W. 16 (1931); Peebly v. Children, 95 Okla. 40, 217 P. 1049 (1923); Carter v. Rathburn, 85 Okla. 251, 209 P. 944 (1922); Fulmore v. Lane, 104 Tex. 499, 140 S.W. 405 (1911); Commonwealth *ex rel.* Elkin v. Barnett, 199 Pa. 161, 48 A. 976 (1901); Commonwealth v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940).
43. State *ex rel.* Teachers & Officers v. Holder, 76 Miss. 158, 23 So. 643 (1898); Mills v. Porter, 69 Mont. 325, 222 P. 428 (1924); State *ex rel.* Finnegan v. Dammann, 220 Wis. 143, 264 N.W. 662 (1936) (the bill under consideration was not an appropriation).
44. MO. CONST. art. III, § 31.
45. 495 S.W.2d at 393.
46. *Id.* at 394.
47. 50 HARV. L. REV. 843, 844 (1937).
48. MO. CONST. art. IV, § 27.
49. *See* Brown v. Morris, 365 Mo. 946, 290 S.W.2d 160 (En Banc 1956).
50. Fitzsimmons v. Leon, 141 F.2d 886 (1st Cir. 1944).
51. Motley v. Callaway County, 347 Mo. 1018, 149 S.W.2d 875 (1941).

USURY—LIMITING THE TIME PRICE DIFFERENTIAL SALE EXCEPTION

Lucas v. Beco Homes, Inc.[1]

Madison and Lora Lucas agreed to purchase a surplus home from Beco Homes, Inc., and to borrow $1,000 for the costs of reconstructing it on their lot. The total invoice price was $3,214.80, of which $3,200 was to be financed. Pursuant to a prior agreement, Beco offered Delta Loan and Finance Co. the Lucas's note for $5,411.17. Delta accepted and discounted the note for a charge of $1,251.44. The balance of the amount was distributed as follows: a dealer reserve held by Delta for Beco of $901.07;[2] purchase of credit life insurance for $378.77; a check to Delta for $1,880, which represented existing indebtedness to Delta from Beco; and two checks to Beco for $500, each representing one-half of the $1,000 construction loan. The home was delivered, but the Lucas's never received the $1,000 construction loan. The home was left unassembled and deteriorated from exposure.

After making 59 payments totaling $3800.70, the Lucas's attempted to abandon the transaction, alleging a conspiracy betwen Beco and Delta and usurious interest charges. The trial court found that there was no conspiracy and that Delta was a holder in due course, but that the loan was usurious. The court allowed recovery of all payments in excess of $3,712 (the principal and a legal rate of interest).[3] In addition, the court enjoined Delta and Beco from further collection or foreclosure on the security.[4] On appeal, Delta argued that the trial court's finding of usury was erroneous because the transaction was a time price differential sale to which usury statutes are inapplicable.

A time price differential sale has generally been considered an exception to usury statutes.[5] It is defined as the difference between one price if cash is paid and another, higher price if payment is deferred. The rationale for the exception is that a seller is entitled to determine the price at which he will sell and to demand a much greater price when payment is deferred.[6]

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1. 494 S.W.2d 417 (Mo. App., D. St. L. 1973).

2. Defendant Beco described dealer reserve as money held back by Delta and given to the dealer as profit when the contract is paid off. *Id.* at 421.

3. § 408.020, RSMo 1969, allows creditors to receive interest of six percent per annum when no other rate has been agreed on for moneys due and payable. § 408.050, RSMo 1969, states that if the rate of interest is in excess of the legal rate, any person collecting the usurious rate shall be liable for any sums paid in excess of the principle and legal rate and also for court costs and reasonable attorney's fees.

4. The note was secured by a quit claim deed on property owned by plaintiffs and a bond for deed signed by Beco and plaintiffs.

5. Usury is defined as "the receiving, securing, or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed at law." 55 AM. JUR. *Usury* § 2 (1946); *see* § 408.050, RSMo 1969.

6. Willard, *Finance Charges or Time Price Differntial in Installment Sales—Usury?*, 24 MO. L. REV. 225 (1959).

For usury purposes courts have therefore distinguished between a sale and a loan of money. This distinction was viable when consumers with little bargaining power utilized loans to secure bare necessities. With the advent of mass consumer credit, however, consumers utilize credit sales, not short term loans, to obtain their necessities.[7] Often the consumer does not have parity of bargaining power in these transactions.[8] Thus, there is much less justification today for distinguishing sales from loans for usury purposes.

Until the early 1950's the courts of most states, including Missouri,[9] applied the time price exception[10] almost universally if the transaction was a bona fide sale and not, in substance, a loan for forbearance.[11] Courts are now increasingly finding that a time price differential sale does involve a loan or forbearance and is therefore subject to the usury statutes.[12]

Courts have used a variety of theories to hold the usury statutes applicable without abandoning the time price exception. Some courts have restricted the exception to time price differential sales as conducted when the exception was formulated over a hundred years ago.[13] Other courts have limited the exception by establishing a series of tests to determine whether a transaction is in reality a loan or forbearance.[14] One test holds that if the credit price is based on a cash price plus a percentage of the cash price, the contract is in essence an agreement to forbear.[15] Another test looks for a

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7. 48 WASH. L. REV. 479 (1973).

8. *Id.*

9. Wyatt v. Commercial Credit Corp., 341 S.W.2d 348 (K.C. Mo. App. 1960); General Contract Purchase Corp. v. Propst, 239 S.W.2d 503 (Spr. Mo. App. 1951); General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S.W. 425 (K.C. Ct. App. 1924).

10. The exception was established in 1861 by the United States Supreme Court in Hogg v. Ruffner, 66 U.S. (1 Black) 115, (1861), in which the Court said:

> [I]f A propose to sell to B a tract of land for $10,000 cash, or for $20,000 payable in 10 annual installments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer $100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one . . . may say, with apparent truth, that B pays a hundred per cent for forbearance, . . . but . . . the conclusion is manifestly erroneous.

Id. at 118-19.

11. *E.g.*, in White v. Anderson, 164 Mo. App. 132, 147 S.W. 1122 (K.C. Ct. App. 1912), the plaintiff sold coupon books worth $10 in merchandise at certain stores for the purchaser's note with five percent interest secured by a chattel mortgage; the merchants then redeemed the coupons with merchandise and charged them to plaintiff less a 10 percent discount. The court held that the transaction was in substance a loan from plaintiff to purchaser, and not a sale of credit.

12. 48 WASH. L. REV. 479 (1973).

13. State v. J.C. Penney Co., 48 Wis. 2d 125, 142-43, 179 N.W.2d 641, 650 (1970).

14. *See* Annot., 14 A.L.R.3d 1065 (1967).

15. Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739 (1944); Lloyd v. Gutgsell, 175 Neb. 775, 124 N.W.2d 198 (1963); Mitchell, *Usury in Arkansas*, 26 ARK. L. REV. 208 (1972).

In *Lucas* the credit price was obtained by adding the cash price of $3,200 to the discount required by Delta; this is arguably the equivalent of charging the cash price plus a percent thereof.

disclosure of two prices, one cash and one credit; a true opportunity to choose between them is an indication that the sale is a true time price differential.[16] Relevant indicia of a loan transaction are ambiguous charges,[17] like a dealer reserve or a handling or carrying charge, an extension of credit on the basis of ability to pay,[18] an absolute sale on delivery with the debt as consideration,[19] and sales tax computed and charged on the cash price.[20]

Some state legislatures have attempted to limit the time price differential exception with statutes specifying the maximum price differential.[21] The effectiveness of some of these statutes has been substantially reduced where they do not extend to the seller's assignee.[22]

An Arkansas case, *Hare v. General Contract Purchase Corp.*,[23] has led to a major limitation of the time price exception: Where there is a close relationship between the seller and finance company, several courts[24] have found there is a loan or forbearance between the finance company and the buyer. This relationship will likely be established if one or more of the

16. Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

17. 494 S.W.2d at 423, 424.

18. State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970); Annot., 14 A.L.R.3d 1065 (1967).

19. State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

20. *Id.*

21. NEB. REV. STAT. §§ 45.204-.208 (1968); N.J. REV. STAT. § 17:16C (1970). Missouri's Retail Credit Act, § 408.300, RSMo 1969, establishes a maximum time price differential in certain retail consumer sales but allows a higher rate than the usury statutes.

22. In Missouri, a note given to evidence a retail sales contract is negotiable and the assignee, if a holder in due course, is not subject to the buyer's personal defenses. § 408.260(1), RSMo 1969. *See also* Eldridge, *The Holder-in-Due Course Concept and the Installment Buyer of Consumer Goods*, 36 U.M.K.C.L. REV. 368 (1968).

23. 220 Ark. 601, 249 S.W.2d 973 (1952). The court said:

> (1) We leave unimpaired the doctrine that the seller may, in a *bona fide* transaction, increase the price to compensate for the risk that is involved in a credit sale. But there may be a question of fact, as to whether the so-called credit price was *bona fide* as such, or only a cloak for usury. (2) If the seller, whether he has quoted two prices to the purchaser or not, subsequently transfers the title documents to an individual or company which is engaged in the business of purchasing such documents, at a price which permits the transferee to obtain more than a return of ten percent on its investment, then a question of fact arises as to whether the seller increased his cash price with the reasonable assurance that he could so discount the paper to such individual or finance company. If that reasonable assurance existed, then the transaction is in substance a loan, and may be attacked for usury.
>
> (3) When the finance companies or purchasers of title paper supply dealers with a set of forms and a schedule for credit price increases, such will tend to show that the dealer had reasonable assurance that such finance company or purchaser . . . would take the paper at discount.

Id. at 609, 249 S.W.2d at 978.

24. State *ex. rel.* Turner v. Younker Bros., Inc. 210 N.W.2d 550 (Iowa, 1973); Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739 (1944); Lloyd v. Gutgsell, 175 Neb. 775, 124 N.W.2d 198 (1963); Rollinger v. J.C. Penney Co., 192 N.W.2d 699 (S.D. 1971); State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

following elements are present: The finance company supplies forms and rate charts to the seller;[25] a particular finance company agrees to take all of a seller's commercial paper;[26] the seller allows the finance company to approve the credit application before making the sale;[27] or the seller immediately assigns both the note and the sales contract to the finance company.[28] Before *Lucas* Missouri courts had held that the relationship between the seller and the finance company did not, in and of itself, render the transaction a usurious loan or forbearance, even if the finance company agrees in advance to accept the note and supplies the forms and the seller bases the time price differential rates on the discount the finance company will charge.[29] *Lucas,* however, held that the transaction was a loan instead of a true time price differential sale[30] and based its decision on the "whole interlocking relationship" between Delta and Beco.[31]

A related area in which the time price differential exception is applied is revolving charge accounts. Large department stores and motor oil companies, for example, charge one and one-half percent per month interest on unpaid balances. Some courts have held that these transactions are not within the time price differential exception and that the agreement amounts to a forbearance on a debt created when the customer charges an item.[32] Other courts have reaffirmed the application of the exception to revolving charges, either because they fear the repercussions of changing the rule[33] or because they believe it is for the legislature to make changes in the usury statute.[34]

Lucas also raises the question whether usury is a defense against a holder in due course.[35] The purpose of the holder in due course concept is to allow commercial paper to flow freely by protecting a holder who takes for value, in good faith, and without knowledge, from defenses that would be good against the seller.[36] This purpose is not served in a transaction in which the seller, by prearrangement, immediately assigns the note and conditional sales contract to a finance company. Most states, including Missouri,

25. Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952).

26. *Id.*

27. *Id. See also* National Bank of Commerce v. Thomsen, 80 Wash. 2d 406, 495 P.2d 332 (1972).

28. Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952).

29. Cases cited note 9 *supra.*

30. 494 S.W.2d at 424.

31. 494 S.W.2d at 423. Although this approach has generally been limited to those cases where the note and the contract were actually assigned to a finance company, there are indications that the transaction may be usurious even without the transfer. Sloan v. Sears, Roebuck & Co., 228 Ark. 404, 308 S.W.2d 802 (1957).

32. Sloan v. Sears, Roebuck & Co., 228 Ark. 404, 308 S.W.2d 802 (1957); State *ex rel.* Turner v. Younker Bros., Inc., 210 N.W.2d 550 (Iowa 1973); Rollinger v. J.C. Penney Co., 192 N.W.2d 699 (S.D. 1971); State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

33. Dennis v. Sears, Roebuck & Co., 446 S.W.2d 260 (Tenn. 1969).

34. Sliger v. R.H. Macy & Co., 59 N.J. 465, 283 A.2d 904 (1971).

35. 494 S.W.2d at 424.

36. § 400.3-302, RSMo 1969.

have cases where a court has found that the close relationship between seller and finance company implies bad faith and refuse to extend the immunity of a holder in due course to the finance company.[37] Even without the implication of bad faith courts increasingly find that the finance company is not a "stranger" to the transaction and thus is not entitled to the status of a holder in due course.[38] The required relationship between seller and finance company is established for this purpose by the same analysis used in regard to the time price differential exception.[39]

Some states have attempted to deal with the holder in due course problem through legislation.[40] By adopting the Uniform Consumer Credit Code, or specific legislation aimed at the problem,[40a] these states essentially abolish the concept of the holder in due course,[41] subjecting, entirely[42] or in part,[43] the assignee to claims and defenses valid against the assignor-seller.

Although the court in *Lucas* did not disturb the trial court's finding that Delta was a holder in due course, it doubted that Delta was entitled to that status.[44] The issue was irrelevant, however, in view of the court's holding that "the general rule is that usury is a defense against a holder in due course to the extent that a statute declares a transaction usurious as to the excess interest."[45] This statement of the general rule is of doubtful

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37. Jones, *Finance Companies as Holders in Due Course of Consumer Paper*, 1958 WASH. U.L.Q. 177; 42 COLO. L. REV. 439 (1970). In Missouri the court will not imply bad faith unless the degree of involvement is extreme, *i.e.*, where the purchaser is clearly being swindled. *See* Morbrose Inv. Co. v. Flick, 187 Mo. App. 528, 174 S.W. 189 (K.C. Ct. App. 1915).

38. Anderson v. Curls, 309 S.W.2d 692 (K.C. Mo. App. 1958); Taylor v. Atlas Security Co., 213 Mo. App. 282, 249 S.W. 746 (K.C. Ct. App. 1923).

39. *See* note 23 and text accompanying notes 23-31 *supra*. The courts look to whether the finance company supplies forms and rate charts (often containing a printed assignment on the back), makes a credit evaluation before the sale is made, has an arrangement to accept all the notes of a particular seller, or accepts the instrument immediately after its execution. Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940).

40. Missouri now has before the legislature a bill that would eliminate the doctrine of the holder in due course in Missouri. S. 556, H. 1047, 77th General Assembly, 1st Sess. (1974).

40a. ALASKA STAT. § 45.50541 (1963); IDAHO CODE § 48-609 (1972); ME. REV. STAT. ANN. tit. II, § 3-302(5) (1964); MASS. GEN. LAWS ANN. ch. 255, § 12c (1968); MINN. LAWS 1971, Ch. 275; N.J. REV. STAT. § 17:16C-64.1 to -64.4 (1937); VT. STAT. ANN. tit. 9, § 2455 (1966).

41. UNIFORM CONSUMER CREDIT CODE § 2.403 states: "In a consumer credit sale or consumer lease . . . the seller or lessor may not take a negotiable instrument other than a check as evidence of the obligation of the buyer or lessee." In addition, UNIFORM CONSUMER CREDIT CODE § 2.403, Comment states: [P]rofessional financers buying consumer paper will normally not qualify as holders in due course with respect to instruments taken by dealers in violation of this section and negotiated to them."
See also Working Re-draft No. 4 § 3.307 (1972). To date, seven states have adopted the UNIFORM COMMERCIAL CREDIT CODE: Colorado, Idaho, Indiana, Kansas, Oklahoma, Utah, and Wyoming.

42. UNIFORM CONSUMER CREDIT CODE § 2.404, alternative A.

43. UNIFORM CONSUMER CREDIT CODE § 2.404, alternative B.

44. 494 S.W.2d at 424.

45. *Id.*

validity.[46]

Nevertheless, *Lucas* indicates a willingness of the court of appeals to limit the protection the holder in due course traditionally enjoys and to use a more realistic analysis of time price differential sales. In evaluating further changes in the latter area the Missouri courts should consider the problems of retroactivity and the legal interest rate. A staggering amount of litigation could arise if major limitations on the time price exception (*e.g.*, excluding revolving charges) operate retroactively. Another consideration is that Missouri's legal interest rates, at six[47] and eight[48] percent, are particularly low and have already made financing difficult to obtain. If applied to all conditional and credit sales the legislature might be compelled to increase them.[49]

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46. Under the UNIFORM COMMERCIAL CODE usury is a defense against a holder in due course only if the effect of the statute is to make the entire transaction null and void. UNIFORM COMMERCIAL CODE § 3-305, comment 6; *see also* 11 AM. JUR. 2D *Bills and Notes* § 678 (1963). Kelly v. Industrial Operating Co., 329 Mo. 629, 46 S.W.2d 181 (1932), *cited* in *Lucas* to support its statement of the law, did not hold the defense good against a holder in due course, but instead held that the defendant was not a holder in due course and that the defense was therefore good against him.

47. § 408.020, RSMo 1969.

48. § 408.030, RSMo 1969.

49. Missouri's Retail Credit Act, § 408.300, RSMo 1969, limits the amount of finance charges on some retail credit sales, but the rates allowed are lower than that on most revolving charges.